

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE ANTHONY J. BATTAGLIA, JUDGE PRESIDING

IN RE INCRETIN-BASED THERAPIES) CASE NO. 13-MD-02452-AJB
PRODUCTS LIABILITY LITIGATION,)
)
)
-----) SAN DIEGO, CALIFORNIA
) 2:03 P.M.
AS TO ALL RELATED AND MEMBER CASES) MARCH 12, 2015
)
-----)

REPORTER'S TRANSCRIPT OF PROCEEDINGS
RE: MOTION HEARING

TELEPHONIC APPEARANCE: HONORABLE WILLIAM F. HIGHBERGER

OFFICIAL REPORTER: JEANNETTE N. HILL, C.S.R.
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REPORTED BY STENOTYPE, TRANSCRIPT PRODUCED BY COMPUTER

MARCH 12, 2015

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SAN DIEGO, CALIFORNIA; THURSDAY, MARCH 12, 2015; 2:04 P.M.

DEPUTY CLERK: CALLING MATTER TWO ON CALENDAR, CASE
NUMBER 13MD2452, IN RE: INCRETIN MIMETICS PRODUCTS LIABILITY
LITIGATION.

THE COURT: ALL RIGHT. WELL, GOOD AFTERNOON TO ALL
OF YOU. WE HAVE A GROUP HERE IN THE COURTROOM AND A GROUP ON
THE PHONE.

DID EVERYONE IN THE COURTROOM SIGN IN ON SIGN-IN
SHEET?

MR. SHKOLNIK: YES, YOUR HONOR.

THE COURT: ANYBODY NOT?

OKAY. RATHER THAN GO THROUGH THE LINEUP, WE'LL MAKE
THAT ATTACHMENT TO THE RECORD FOR THAT THAT PERSONALLY
APPEARED. AND I HAVE A LIST OF 49 OTHER NAMES FOR THE PEOPLE
ON THE TELEPHONE, AND WE'LL NOTE THAT AS THE APPEARANCES BY
PHONE.

AND THEN ANYONE SPEAKING IN COURT OR BY PHONE SHOULD
IDENTIFY THEMSELVES, IN ADDITION TO THEIR COMMENTS, SO WE CAN
KEEP TRACK.

JUDGE HIGHBERGER, AS I UNDERSTAND, WILL BE JOINING
LATER IN THE AFTERNOON WHEN HE IS FREE.

JUDGE, ARE YOU ON THERE NOW?

JUDGE HIGHBERGER: I'M HERE, LISTENING. I'M NOT
AVAILABLE AFTER 3:30.

THE COURT: OKAY. GREAT. SO WE HAVE THE MOTION TO

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1 DISQUALIFY EXPERT FLEMING. I HAVE A TENTATIVE RULING ON ONE
2 ISSUE, WHICH I'LL SHARE, AND THEN SOME QUESTIONS ON THE ISSUES
3 THAT ARE REALLY DETERMINATIVE IN LARGE PART.

4 AND AFTER WE WADE THROUGH ALL OF THAT, I WILL
5 CERTAINLY GIVE THE SIDES A CHANCE TO SAY ANY OTHER COMMENTS.

6 FROM THE TENTATIVE STANDPOINT, I DON'T FIND THAT THE
7 DEFENSE WAIVED THEIR RIGHT TO BRING THE MOTION OR DELAYED
8 UNNECESSARILY HERE. I THINK IF IT WERE A SITUATION LIKE THE
9 SALIENT OR ON-POINT AUTHORITY THAT THE PLAINTIFFS QUOTED ABOUT
10 THE EIGHT-MONTH DELAY, THAT WOULD BE ONE THING.

11 AND HERE, I GUESS, BY ANALOGY, HAD THE PLAINTIFFS
12 DISCLOSED MR. FLEMING'S INVOLVEMENT AND THE DEFENSE THEN HAD
13 WAITED UNTIL AFTER THE REPORT, I MIGHT SEE IT DIFFERENTLY. BUT
14 I DO FIND NO WAIVER TO HAVE OCCURRED.

15 AS FAR AS THE ISSUES ON CONFIDENTIALITY, AND THEN
16 DOVETAILING INTO PREJUDICE, LET ME ASK, FROM THE PLAINTIFFS'
17 STANDPOINT, MR. FLEMING -- OR PERHAPS IT'S DR. FLEMING, TO BE
18 FAIR TO HIM -- IS NOTED IN THE DIALOGUE HERE AS A PREEMPTION
19 EXPERT. THE REPORT HE HAS SEEMS TO GO ON PERHAPS TO THINGS
20 BEYOND JUST THAT QUESTION, BUT THAT MAY BE A MATTER OF DEBATE.

21 BUT ASSUMING I DENY THE DISQUALIFICATION ISSUE --
22 WELL, LET ME BACK UP. ASSUMING I FIND THERE IS NO PRESUMPTION
23 HERE, WOULD THERE BE ANY OTHER USE FOR DR. FLEMING IN THE CASE
24 FROM THE PLAINTIFFS' SIDE, OR IS HIS ROLE SOLELY GOING TO BE
25 PREEMPTION?

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1 **MR. JOHNSON:** YOUR HONOR, GOOD AFTERNOON. MICHAEL
2 JOHNSON ON BEHALF OF THE PLAINTIFFS.

3 **THE COURT:** YES, SIR.

4 **MR. JOHNSON:** YOUR HONOR, YES. THERE WOULD BE A ROLE
5 IN THIS CASE FOR DR. FLEMING, AND THAT WOULD BE AS AN
6 ENDOCRINOLOGIST.

7 **THE COURT:** OKAY. AND WOULD THAT BE WITH REGARD TO
8 GENERAL CAUSATION ISSUE, OR ARE WE TALKING ABOUT WHEN WE GET
9 ULTIMATELY DOWN TO MORE INDIVIDUALIZED CAUSATION ASSESSMENT OF
10 THE VARIOUS PLAINTIFFS?

11 **MR. JOHNSON:** YOUR HONOR, I WHOLEHEARTEDLY APOLOGIZE.
12 COULD I ASK YOU TO REPEAT THE QUESTION?

13 **THE COURT:** OH, SURE. HE WOULD BE A POTENTIAL EXPERT
14 ON ENDOCRINOLOGY IN WHAT RESPECT -- GENERAL CAUSATION, SPECIFIC
15 CAUSATION, OR A COMBINATION OF ALL THE ABOVE?

16 **MR. JOHNSON:** WITH RESPECT TO GENERAL CAUSATION, YOUR
17 HONOR. AND ALTHOUGH WE AREN'T AT THAT POINT YET, BUT IT IS
18 FORESEEABLE THAT HE COULD BE USED FOR SPECIFIC CAUSATION, AS
19 WELL.

20 AND I DID JUST WANT TO CLARIFY MY EARLIER ANSWER, AS
21 WELL. IN ADDITION TO USING HIM AS AN ENDOCRINOLOGIST IN THE
22 FUTURE, AND IN ADDITION TO PREEMPTION, HE WOULD ALSO BE USED AS
23 A GENERAL EXPERT WITH RESPECT TO FDA REGULATORY AFFAIRS. THAT
24 MIGHT BE OUTSIDE OF THE SCOPE OF JUST PREEMPTION.

25 **THE COURT:** FAIR ENOUGH. I APPRECIATE YOU QUALIFYING

1 THAT. AND WHILE I HAVE YOU AT THE PODIUM, IN THE STATEMENT OF
2 FACTS THAT WERE SUBMITTED -- AND IF YOU ARE NOT THE RIGHT
3 PERSON TO RESPOND FROM THE PLAINTIFFS' SIDE FEEL FREE TO YIELD.
4 AND THIS IS NOT A LITERAL QUOTE; IT'S A PARAPHRASE.

5 BUT ISSUES WITH PANCREATIC CANCER INVOLVED IN THE
6 LITIGATION DID NOT ARISE UNTIL AFTER DR. FLEMING'S CONSULTING
7 WORK WITH NOVO WAS DONE. AND MY QUESTION IS WHAT DOES THAT
8 MEAN, THE ISSUES DIDN'T ARISE? NO ONE HAD CLAIMED OR ALLEGED A
9 RELATIONSHIP BETWEEN THE DRUG AND THE ONSET OF PANCREATIC
10 CANCER, OR THERE HAVE BEEN NO DISCUSSIONS ABOUT ANY POTENTIAL
11 RISK FACTOR IN ANY REGARD, OR WHAT?

12 **MR. JOHNSON:** YOUR HONOR, I AM GOING TO ACTUALLY TURN
13 THAT OVER TO ONE OF MY COLLEAGUES.

14 **THE COURT:** FAIR ENOUGH.

15 **MR. KENNERLY:** YOUR HONOR, GOOD AFTERNOON. MAX
16 KENNERLY FOR THE PLAINTIFFS. I WROTE THAT SENTENCE.

17 **THE COURT:** OKAY.

18 **MR. KENNERLY:** SO WHAT I MEANT BY THAT WAS -- NOW, I
19 ALSO DEPOSED MICHELLE THOMPSON, THE REGULATORY AFFAIRS OFFICER
20 FOR NOVO. WHAT WAS MEANT BY THAT IS IF WE'RE ASKING THE
21 QUESTION WHAT DID DR. FLEMING LEARN WHEN HE WAS CONSULTING FOR
22 NOVO, WE HAVE TO START WITH WELL, WHAT WAS NOVO LIKELY TO TELL
23 HIM, WHAT DID NOVO TELL HIM.

24 AND WE HAVE TWO DIFFERENT TYPES OF RESPONSES. ONE IS
25 THEY HAVEN'T SHOWN ANYTHING THEY SPECIFICALLY TOLD HIM.

1 SECOND, THE REASON WE PUT THAT IN THERE IS THERE IS
2 NO REASON TO EVEN ASSUME OR START TO BELIEVE THAT THEY COULD
3 HAVE TOLD HIM ANYTHING ABOUT PANCREATIC CANCER.

4 MICHELLE THOMPSON, WHEN I DEPOSED HER, ONE OF THE
5 QUESTIONS I ASKED HER SPECIFICALLY WAS HAVE YOU EVER
6 COMMUNICATED WITH THE FDA ABOUT PANCREATIC CANCER? AND HER
7 ANSWER WAS NO, I HAVE NOT.

8 I ASKED HER WELL, HOW DO YOU DETERMINE HOW YOU'RE
9 GOING TO CHANGE YOUR WARNINGS RELATING TO PANCREATIC CANCER?
10 SHE TOLD ME THIS ORIGINATED OUTSIDE OF THE UNITED STATES, IN AN
11 OFFICE IN DENMARK. AND SHE COULD PUT NO TIME LINE ON WHEN THEY
12 FIRST STARTED LOOKING AT IT. NOVO, TO THIS VERY DAY, CONTINUES
13 TO MAINTAIN THERE IS NO ISSUE WITH PANCREATIC CANCER.

14 SO OUR POINT IN ARGUING THAT IS WE THINK IT'S WRONG
15 AS A MATTER OF LAW FOR THIS COURT TO PRESUME THERE IS
16 CONFIDENTIAL INFORMATION BEING EXCHANGED TO HIM. THE CASE LAW
17 SAYS THE OPPOSITE. BUT OUR POINT THERE IS EVEN IF THE COURT
18 DOES SUCH PRESUMPTION OF "WELL, HE'S TALKING WITH PEOPLE, HE
19 MUST BE LEARNING SOMETHING," HE WOULDN'T BE LEARNING ANYTHING
20 ABOUT PANCREATIC CANCER. OUR ALLEGATION IS NOVO SHOULD HAVE
21 KNOWN, BASED ON ITS INFORMATION.

22 BUT THE FACTS ARE NOVO, AT LEAST INTERNALLY, FROM
23 WHAT WE'VE SEEN, THEY ARE NOT HOLDING STUDIES ON THIS. THEY
24 ARE NOT FLAGGING IT AS AN ISSUE. AND IN NOTHING WE SAW
25 REFERENCING DR. FLEMING, ATTACHED TO THEIR MOTION, IS THERE ANY

1 REFERENCE TO AN ISSUE WITH PANCREATIC CANCER.

2 SO THAT IS WHAT WE MEANT BY THAT, YOUR HONOR, IS THAT
3 HE LEFT BEFORE THERE WAS ANY DISCUSSION, AT LEAST THAT WE KNOW
4 OF, INSIDE OF NOVO ABOUT THAT.

5 **THE COURT:** OKAY. AND ALONG THAT SAME LINE -- AND,
6 AGAIN, YOU MAY YIELD TO ONE OF YOUR COLLEAGUES BECAUSE I KNOW
7 YOU'VE DIVIDED UP THE WORK IN MANY RESPECTS -- BUT HOW FAR BACK
8 DOES THE DISCOVERY THAT YOU HAVE NOW ON VICTOZA GO?

9 DOES IT GO BACK INTO THE '79 AND EARLIER -- OR 2009
10 AND EARLIER? I DON'T KNOW WHERE I GOT '70. BUT 2009 AND
11 EARLIER, OR IS IT THAT POINT FORWARD? IN OTHER WORDS, DOES THE
12 DISCOVERY OVERLAP A PERIOD IN WHICH TIME DR. FLEMING WAS
13 CONSULTING?

14 **MR. KENNERLY:** I'D HAVE TO YIELD, YOUR HONOR.

15 **MR. SHKOLNIK:** YOUR HONOR, HUNTER SHKOLNIK. SORRY
16 FOR THE BOUNCING AROUND. THERE IS NO QUESTION WE HAVE BEEN
17 PROVIDED DISCOVERY DATING BACK SINCE, I THINK, THE EARLY 2000S.
18 I'M SURE COUNSEL WILL CORRECT ME. BUT THEY GAVE US THE FULL
19 PACKAGE OF THE GENERAL CAUSATION AND REGULATORY MATERIALS FROM
20 THE INCEPTION OF THE DRUG. AND THAT WOULD CERTAINLY BE INTO
21 THE 2002, 2003 TIME FRAME. MAYBE ONE YEAR AFTER, ONE YEAR
22 BEFORE. AND IT INCLUDED 2009. AND WE'VE HAD IT RIGHT UP UNTIL
23 THE CUT-OFF DATE IN 2013. THANK YOU.

24 **THE COURT:** OKAY. THAT HELPS. THANK YOU VERY MUCH.

25 TURNING TO NOVO, WHO IS GOING TO SPEAK FOR THEM? AS

1 I LOOK AT THE CASE LAW ON THIS ISSUE OF CONFIDENTIAL
2 INFORMATION RELEVANT TO THE LITIGATION, MOST OF THE ISSUES OR
3 FACTORS THAT ARE ADDRESSED ARE THINGS THAT RELATE TO LITIGATION
4 AND THE LIKE -- STRATEGIES, ANTICIPATED WITNESSES, AND SO
5 FORTH. AND THE MAJORITY OF THE WORK OR CONNECTION BETWEEN
6 FLEMING AND YOUR CLIENT SEEMS TO BE THE OTHER -- OTHER THINGS.

7 SO I'M NOT SURE I SEE WHERE -- NO DOUBT A
8 CONFIDENTIAL RELATIONSHIP. I DON'T THINK THAT IS REALLY A BIG
9 ISSUE. THERE MAY BE A QUESTION ABOUT COMPETITOR ON THE
10 SANCTIONS, BUT WE'RE DEALING NOW WITH THE CONFIDENTIAL
11 INFORMATION.

12 BUT OF WHAT ILK IS THAT? BECAUSE IT DOESN'T SEEM TO
13 BE THE STRATEGIC WITNESS-RELATED TYPE OF THING, FROM WHAT I
14 GLEANED FROM THE RECORD.

15 **MR. BROWN:** OKAY. SO, YOUR HONOR, MAYBE I CAN HELP
16 YOU WITH THE RECORD. LOREN BROWN FOR NOVO NORDISK. THANK YOU,
17 YOUR HONOR.

18 FIRST, I THINK AS A GENERAL MATTER, I WOULD LIKE TO
19 TALK ABOUT SOME OF THE THINGS HE WAS INVOLVED WITH, AND I CAN
20 POINT TO ANY ASPECTS OF THE RECORD AND THE EXHIBITS, IF THAT
21 WOULD BE HELPFUL. AND THEN I'LL TALK ABOUT SOME SPECIFIC
22 ISSUES THAT ARE RAISED IN HIS REPORT, WHERE HE WAS DEEPLY IN
23 THE MIDDLE OF LONG BEFORE HE EVER DECIDED TO BE AN EXPERT IN
24 THIS CASE.

25 SO IF YOU LOOK AT THE EXHIBITS THAT WE HAVE, AND WE

1 LOOK AT THE ALMOST-DECADE-LONG TIME THAT HE WAS A CONSULTANT
2 FOR NOVO NORDISK, YOU WILL SEE THAT DR. FLEMING WAS PRIVY TO
3 VIRTUALLY THE DATA RELATED TO THE ENTIRE CLINICAL PROGRAM
4 RELATED TO VICTOZA, THEIR PLANS AND STRATEGY RELATED TO THE
5 DESIGN OF STUDIES, HOW THE COMPANY AND OTHER CONSULTANTS WHO
6 WERE SUBJECT TO CONFIDENTIAL AGREEMENTS WERE INTERPRETING THE
7 DATA, THE COMPANY'S REGULATORY STRATEGY, HOW THE COMPANY
8 THOUGHT ABOUT VICTOZA'S LABELING AND NOVO NORDISK INTERACTIONS
9 WITH THE FOOD AND DRUG ADMINISTRATION.

10 AND ALL OF THIS SHOWS THAT DR. FLEMING OBTAINED DEEP
11 KNOWLEDGE AND INSIGHTS ABOUT VICTOZA, WHICH COULD NOT HAVE BEEN
12 OBTAINED WITHOUT THE VIOLATION OF SEVEN CONFIDENTIALITY
13 AGREEMENTS.

14 AND IF YOU WANT TO TALK ABOUT SPECIFICS THAT RELATE,
15 BESIDES CONSULTATION ON STUDY DESIGN, INTERPRETATION OF DATA,
16 REGULATORY STRATEGY, LABELING STRATEGY, THERE ARE VERY SPECIFIC
17 PARTS OF THE RECORD THAT GO RIGHT TO HIS CONTENTIONS IN HIS
18 REPORT.

19 ONE OF THEM IS THIS THEORY BIOLOGICALLY THAT YOU HAVE
20 HEARD BEFORE, YOUR HONOR, THAT ALL OF THESE MEDICATIONS SOMEHOW
21 STIMULATE THE GROWTH OF PANCREATIC BETA CELLS. THAT IS IN
22 DR. FLEMING'S REPORT AT PAGES 43, 49, 51, AND 59.

23 AND IF YOU LOOK AT EXHIBITS OF OUR MOTION -- THAT IS,
24 EXHIBITS THAT REFLECT HIS WORK WHILE CONSULTING FOR NOVO, YOU
25 WILL SEE HOW THESE BETA CELL PROLIFERATION THEORIES WERE

1 DISCUSSED AT EXHIBITS 11, 12, 15, AND 16.

2 HE IS GETTING DEEP KNOWLEDGE AND INSIGHTS ABOUT NOVO
3 NORDISK'S PROGRAM DATA THAT, ACCORDING TO DR. FLEMING, SUPPORTS
4 HIS THEORY OF BETA CELL PROLIFERATION. AND HE IS GETTING IT IN
5 A WAY THAT GIVES HIM A VERY UNFAIR ADVANTAGE IN THIS CASE. AND
6 I WILL TALK A LITTLE BIT MORE ABOUT THAT IN A SECOND, BUT I
7 WANT TO POINT OUT TWO OTHER THINGS.

8 NUMBER TWO IS THE PLAINTIFFS' THEORY THESE DRUGS
9 SOMEHOW INCREASE INFLAMMATION OF THE PANCREAS, CAUSE
10 PANCREATITIS, AND THAT SOMEHOW LEADS TO PANCREATIC CANCER.

11 AND IF YOU LOOK AT DR. FLEMING'S REPORT, PAGES 28 TO
12 32, 44 AND 45, 48 AND 53, YOU WILL SEE EXTENSIVE DISCUSSIONS
13 ABOUT THE SUPPOSED RELATIONSHIP BETWEEN THE PANCREATITIS
14 EFFECTS OF THESE DRUGS AND PANCREATIC CANCER.

15 THAT'S ANOTHER SUBJECT THAT WAS PART OF DR. FLEMING'S
16 WORK WHILE CONSULTING FOR NOVO. PANCREATITIS ISSUES WERE
17 DISCUSSED IN EXHIBITS 15 AND 16 OF NOVO'S MOTIONS. THOSE ARE
18 MEETINGS WHERE HE AND OTHERS WERE CALLED IN TO HELP INTERPRET
19 DATA AND TO HELP PLAN STUDIES THAT WOULD GET AT THESE
20 PANCREATITIS QUESTIONS.

21 A THIRD ISSUE, WHICH IS VERY SPECIFIC TO THIS CASE,
22 IS THE OBSERVATIONAL STUDIES. IN NOVO'S CASE, THE OPTUM
23 INSIGHT STUDY, WHICH IS AN OBSERVATIONAL STUDY THAT WAS
24 INTENDED TO LOOK AT SOME OF THE SAFETY ISSUES.

25 AND DR. FLEMING CRITICIZES THE OPTUM INSIGHT STUDY

1 AND ITS DESIGN ON PAGES 73 TO 75 OF HIS REPORT, 78 TO 80, 92 TO
2 96, AND 98 TO 101.

3 NOW, WHILE HE IS CRITICIZING OPTUM INSIGHT AND ITS
4 DESIGN, IN HIS EXPERT REPORT HE WAS SPECIFICALLY INVOLVED IN
5 CONSULTING ON THE DESIGN OF THIS OBSERVATIONAL STUDY.

6 IF YOU LOOK AT EXHIBITS 15 AND 16 AGAIN, YOU WILL SEE
7 REFERENCES TO THE DATABASE THAT WAS USED AS PART OF THIS OPTUM
8 INSIGHT STUDY, AND HOW THE DESIGN WAS BEING DISCUSSED WITH
9 DR. FLEMING IN THE ROOM.

10 SO I COULD CERTAINLY LIST MANY OTHER THINGS HE WAS
11 INVOLVED IN -- AGAIN, GETTING INTO THE HEADS OF NOVO'S
12 EXECUTIVES ABOUT HOW THEY THOUGHT ABOUT THESE MEDICATIONS, HOW
13 THEY THOUGHT ABOUT SAFETY, HOW THEY THOUGHT ABOUT REGULATORY
14 STRATEGY, HOW THEY THOUGHT ABOUT LABELING -- HE WOULD ONLY BE
15 IN THAT POSITION BY VIRTUE OF THE FACT THAT HE VIOLATED
16 CONFIDENTIALITY AGREEMENTS.

17 AND FROM A POLICY PERSPECTIVE, THAT PUTS US IN A VERY
18 TOUGH SPOT. NUMBER ONE, IT WOULD ALLOW DR. FLEMING TO PROFIT
19 FROM HIS BREACH OF SEVEN CONFIDENTIALITY AGREEMENTS.

20 BUT MORE IMPORTANTLY, IF AND WHEN WE HAVE TO TRY
21 THESE CASES, DR. FLEMING IS GOING TO HAVE THE BENEFIT OF
22 FIRSTHAND INSIGHTS, FIRSTHAND EXPERIENCES, FIRSTHAND MEETINGS,
23 THE BENEFIT OF CONFIDENTIAL COMMUNICATIONS, NOT ONLY FROM THE
24 COMPANY, BUT FROM OTHERS WHO WERE SUBJECT TO CONFIDENTIALITY
25 AGREEMENTS, AND HE COULD VERY WELL ENJOY A SPECIAL STATUS WITH

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1 JURORS JUST BY VIRTUE OF HIS INSIDER STATUS IN THIS CASE. AND
2 HE ONLY GETS THAT INSIDER STATUS AS A RESULT OF VIOLATING
3 AGREEMENTS.

4 EVERY OTHER EXPERT IN THE CASE DOESN'T GET THAT
5 ADVANTAGE. IT PUTS US IN A TOUGH SPOT CROSS-EXAMINING HIM, AND
6 ALLOWS HIM TO PROFIT FROM THE BREACH OF AGREEMENTS. WHICH, AS
7 THE LAW SAYS -- AND AS YOUR HONOR KNOWS, IN ALL OF THE CASES,
8 PARTICULARLY THE ONES IN CALIFORNIA, ONE OF THE PURPOSES OF
9 THIS RULE IS TO PROMOTE THE INTEGRITY OF THE LEGAL PROCESS.

10 AND TO ALLOW HIM TO GAIN ADVANTAGE, BOTH NOW AND
11 POTENTIALLY IN A JURY CASE, BY VIRTUE OF THE BREACH OF SEVEN
12 DIFFERENT CONTRACTS, WOULD UNDERMINE THE INTEGRITY OF THE
13 PROCESS.

14 **THE COURT:** AND I APPRECIATE THAT. BUT THE
15 INFORMATION THAT YOU CITE IN TERMS OF NOVO'S WORK -- I WON'T
16 RESTATE IT -- BUT THAT WOULD BE GIVEN TO ANY EXPERT, WOULD IT
17 NOT, FROM WHICH SIMILAR OPINIONS MIGHT BE YIELDED?

18 **MR. BROWN:** WELL, CERTAINLY THERE IS SOME OVERLAP,
19 YOUR HONOR. THERE IS NO QUESTION. THERE IS OVERLAP BETWEEN
20 THE DISCOVERY THAT THE PLAINTIFFS WERE ENTITLED TO TAKE AND THE
21 INFORMATION THAT DR. FLEMING WAS PRIVY TO.

22 HOWEVER -- OKAY -- HE HAS A SEAT AT THE TABLE WHERE
23 HE IS WORKING WITH AND LISTENING TO NOVO'S MOST SENIOR
24 SCIENTISTS, ITS CHIEF MEDICAL OFFICER, THE SCIENTIST WHO THE
25 PLAINTIFFS CALL THE MOTHER OF VICTOZA. IT'S GETTING DEEP

1 INSIGHTS ABOUT HOW THEY THINK ABOUT ALL OF THIS. SOME OF THAT
2 IS REFLECTED IN THE DOCUMENTS; MUCH OF IT ISN'T.

3 BUT AGAIN, IT ALLOWS HIM TO HAVE A STATUS, ESPECIALLY
4 IN FRONT OF JURORS, WHERE HE CAN SAY HE WAS THERE, HE WAS
5 LISTENING TO THIS, HE WAS PART OF THAT PROCESS, HE KNOWS HOW
6 THE COMPANY THINKS ABOUT THESE THINGS, HE UNDERSTANDS THEIR
7 DECISION-MAKING. AND BEING ABLE TO DO THAT ONLY BECAUSE HE
8 BREACHED AGREEMENTS IS UNFAIR.

9 **THE COURT:** AND I TAKE IT THAT MY FIRST QUESTION TO
10 THE PLAINTIFFS' GROUP ABOUT HIS OTHER USE IN THE CASE BEYOND
11 MERELY THE PREEMPTION ISSUE JUST ADDS FUEL TO THE FIRE, YOU
12 FEAR?

13 **MR. BROWN:** THAT WOULD MAKE IT WORSE.

14 **THE COURT:** OKAY. ALL RIGHT. WELL, THANK YOU.

15 ANYBODY ON THE PLAINTIFFS' SIDE WANT TO RESPOND ON
16 THIS? I DO THINK IT'S A SIGNIFICANT ARGUMENT ABOUT THE SPECIAL
17 INSIGHT THAT FLEMING HAS HAD. IT'S SORT OF AN EXTRA BOOST.
18 BUT YOU TELL ME.

19 **MR. KENNERLY:** YOUR HONOR, LET ME GET TO THE
20 INSIDER -- THE SPECIAL STATUS AT TRIAL IN JUST A SECOND BECAUSE
21 I THINK SOME OF THESE REQUIRE A RESPONSE.

22 STARTING WITH THE BETA CELL GROWTH, WE DEALT WITH
23 THIS ON PAGE 11, FOOTNOTE 13 OF OUR BRIEF. WIKIPEDIA TALKS
24 ABOUT BETA CELL INVOLVEMENT IN DIABETES. THIS IS NOT SPECIAL.
25 THIS IS NOT SOMETHING NOVO DEVELOPED. IT IS SOMETHING THAT

1 PREDATES ALL OF THE DRUGS IN THIS LITIGATION.

2 THERE IS AN ARTICLE BY GIER -- WE CITE THIS IN OUR
3 MASTER COMPLAINT -- SAYING THAT THE HOLY GRAIL OF DIABETES
4 TREATMENT IS TO STIMULATE ADDITIONAL GROWTH IN BETA CELLS.

5 THIS IS BASIC DIABETES MEDICATION SCIENCE. IT HAS
6 NOTHING SPECIAL FOR NOVO. IT'S BEEN WELL-KNOWN. AND NOVO
7 ITSELF DISCLOSED IT AGAIN IN ITS FDA BRIEFING DOCUMENT. BUT
8 THIS IS NOT SOMETHING THAT WOULD BE CONFIDENTIAL TO ANYBODY.
9 THIS IS WHY THEY ARE ABLE TO TALK ABOUT IT WITH NO PREPARATION.

10 AND I THINK UNDERLYING THAT, TOO, IS DR. FLEMING WAS,
11 QUOTE, PRIVY TO, CLOSE QUOTE, VIRTUALLY ANYTHING. WELL, NO, HE
12 WASN'T. HE WAS GIVEN A SMALL BINDER OF MATERIALS. HE DOESN'T
13 KNOW WHERE THOSE ARE. HE HASN'T LOOKED FOR THEM. THAT'S HIS
14 DECLARATION. HE WASN'T GIVEN ACCESS TO THEIR SERVERS OR
15 SCIENTIFIC INFORMATION. THIS IS WHY THEY ARE JUST BOUNCING
16 GENERAL IDEAS OFF HIM.

17 MOVING TO THE THEORY OF INFLAMMATION. THIS IS ALSO
18 IN OUR COMPLAINT IN THIS CASE. IT'S THE THEORY THAT BUTLER
19 DISCUSSES, IT'S THE THEORY THAT GIER DISCUSSES, IT'S THE THEORY
20 THAT FRED GORELICK DISCUSSES IN HIS PRESENTATIONS. THIS IS
21 WELL-KNOWN. CHRONIC PANCREATITIS LEADS TO INFLAMMATION, LEADS
22 TO PROGRESSION OF THE PANIN NEOPLASMS, LEADS TO PANCREATIC
23 CANCER. THIS IS ALL WELL-KNOWN. IT'S WELL ACCEPTED IN THE
24 FIELD, WELL IN ADVANCE OF ANYTHING WITH THIS CASE, WELL IN
25 ADVANCE OF THESE DRUGS.

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1 TO SAY THAT THIS IS SOME SORT OF SECRET THEORY THAT
2 NOVO DEVELOPED IS SIMPLY WRONG. AND, AGAIN, YOUR HONOR IS
3 CORRECT, ALL THIS INFORMATION WOULD GO TO ANY EXPERT THAT WE
4 FOUND. IT WOULD GO TO ANYONE ON THE CASE.

5 SIMILARLY, THE OPTUM STUDY. WE DEALT WITH THAT ON
6 PAGE SEVEN OF OUR BRIEF. THERE IS A SHORT LITTLE DISCUSSION
7 ABOUT WELL, WHAT DO WE HAVE TO LOOK AT TO CAPTURE SOME OF THESE
8 EVENTS. NOW, AGAIN, THEY ARE NOT TALKING ABOUT PANCREATIC
9 CANCER. THEY ARE JUST TALKING ABOUT EVENTS, IN GENERAL.

10 FLEMING HIMSELF THEN GIVES NOVO INFORMATION ABOUT
11 WELL, IF WE PULL IT OUT OF I3APERIO -- IT'S NOT A GREAT SOURCE
12 OF INFORMATION, BUT IT COULD HAVE SOME BENEFITS. HE IS NOT
13 WRITING THE OPTUM STUDY. HE IS NOT WRITING THE PROTOCOLS. HE
14 SHOWS UP FOR A DAY-LONG MEETING WHERE THEY DISCUSS A HOST OF
15 ISSUES. AND IN THERE THEY BOUNCE OFF OF HIM: WHAT ARE YOU
16 GOING TO DO WITH THE I3APERIO? HE GIVES HIS GENERAL OPINION.

17 **THE COURT:** COULD YOU SPELL THAT?

18 **MR. KENNERLY:** LOWER CASE I, NUMBER THREE,
19 A-P-E-R-I-O.

20 **THE COURT:** THANK YOU. GO AHEAD.

21 **MR. KENNERLY:** SO, AGAIN, THEY BOUNCE AN IDEA OFF OF
22 HIM. HE TELLS THEM HE IS THE FOREMOST EXPERT ON DIABETES
23 REGULATION IN THE COUNTRY. HE BOUNCES BACK HIS OPINION AND
24 THAT'S IT. THE IDEA THAT HE IS LEARNING SOME SORT OF SECRET
25 INFORMATION FROM NOVO, BECAUSE THEY ARE CONSIDERING USING

1 I3APERIO, WELL, THIS IS STANDARD IN THE PHARMACEUTICAL FIELD
2 THAT YOU WOULD LOOK AT THESE TYPE OF DATABASES. SO, AGAIN,
3 THERE IS NOTHING SPECIAL WITH THAT.

4 I WILL ALMOST GET TO YOUR INSIDER STATUS IN A SECOND,
5 BUT THERE IS ONE MORE THAT I THINK IS IMPORTANT HERE.

6 **THE COURT:** SURE.

7 **MR. KENNERLY:** THERE IS A CONSTANT ASSERTION HERE HE
8 BREACHED HIS CONFIDENTIALITY AGREEMENT. THERE HAS NEVER BEEN
9 ANY DESCRIPTION AS TO HOW OR WHY THEY BELIEVED THAT. I THINK
10 THE BEST DESCRIPTION I GOT THERE WAS WELL, HE MUST HAVE. TO
11 KNOW HOW BETA CELLS WORK IN DIABETES, HE MUST HAVE BREACHED IT.
12 TO KNOW WHAT I3APERIO IS, HE MUST HAVE BREACHED IT. TO KNOW
13 WHAT INFLAMMATION IS, HE MUST HAVE BREACHED IT. WELL, THOSE
14 ARE ALL NONSENSICAL. THOSE ARE ALL BASIC SCIENTIFIC
15 PRINCIPLES.

16 HIS ACTUAL CONFIDENTIALITY AGREEMENTS, WHEN WE LOOKED
17 AT THEM, WHEN THEY WERE FINALLY PROVIDED TO US BY DEFENDANTS,
18 MOST OF THEM SUNSET. MOST OF THEM HAVE A TERM OF ONE YEAR ON
19 THEM AND THEN THEY'RE DONE.

20 BUT I THINK AN IMPORTANT POINT HERE IS THERE IS AN
21 ENTIRE OTHER LINE OF CASES, APART FROM *HEWLET-PACKARD*, ABOUT
22 TRYING TO GET AN EXPERT WHO YOU THINK HAS ACTUALLY BREACHED A
23 CONFIDENTIALITY AGREEMENT. DEFENDANTS THEMSELVES CHOSE NOT TO
24 GO THAT ROUTE BECAUSE THEY KNOW THAT THERE IS NO SUPPORT BEHIND
25 IT. THEY KNOW THERE IS NOT ONE SHRED OF EVIDENCE THAT HE HAS

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1 BREACHED ANY PART OF THOSE AGREEMENTS. THERE IS NOTHING HE HAS
2 PROVIDED PLAINTIFFS. THERE IS NO INDICATION OF THAT.

3 SO IF YOUR HONOR WANTS TO FIND THERE IS A BREACH OF
4 THE CONFIDENTIALITY AGREEMENT, WHAT FACTS WOULD SUPPORT THAT?
5 THERE IS NO DECLARATIONS HERE FROM THE DEFENDANTS. THERE IS NO
6 ONE SENTENCE IN HIS REPORT THAT THEY CAN SAY MUST HAVE COME
7 FROM A BREACH OF CONFIDENTIALITY. THERE IS NONE THAT THEY CAN
8 EVEN IMPLY WENT THAT WAY, WHICH TAKES US TO INSIDER STATUS.

9 THIS IS NOT RECOGNIZED BY ANY OF THE AVAILABLE
10 PRECEDENTS. THERE IS NO CASE LAW ANYWHERE IN THE COUNTRY THAT
11 SAYS YOU ARE PRECLUDED FROM CALLING AN EXPERT WHO PREVIOUSLY
12 DID ANY WORK WITH ANY PHARMACEUTICAL COMPANY. SUCH A RULE
13 WOULD WREAK HAVOC ON EXPERTS IN ANY TYPE OF LITIGATION.

14 IF YOU COULD NEVER CALL ANYONE WHO HAD EVER WORKED AT
15 THE COMPANY THAT'S YOUR DEFENDANTS, YOU WOULD BE STUCK WITH
16 OUTSIDE EXPERTS. YOU WOULD BE STUCK WITH PEOPLE GETTING
17 CHALLENGES BECAUSE THEY WERE UNQUALIFIED. IT WOULD NOT TAKE
18 MUCH FOR THE DEFENDANTS HERE IN THE PHARMACEUTICAL INDUSTRY TO
19 TAKE THE WHOLE FIELD OF POTENTIAL EXPERTS AND GET RID OF THEM
20 ALL BY HAVING THEM COME IN ONCE A YEAR.

21 YOU KNOW, I THINK IT'S IMPORTANT HERE. THE
22 DEFENDANTS THEMSELVES, WHO ARE THE LARGE DRUG COMPANIES IN THE
23 WORLD, COULD NOT FIND ONE PERSON WITH EXPERIENCE IN DIABETES
24 REGULATION WHO WOULD SUPPORT THEIR PREEMPTION ARGUMENT. NOT
25 ONE. THEY HAD TO FIND AN EXPERT WHO DID SOME OTHER FIELD.

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1 WE FOUND ONE. WE FOUND ONE WHO IS QUALIFIED. WE
2 FOUND THE PREEMINENT ONE IN THE FIELD. THEIR ARGUMENT HERE IS
3 WELL, WE CAN GET RID OF ANY EXPERT WE WANT. WE CAN GET RID OF
4 ANY FORMER FDA OFFICIAL IF WE RETAIN THEM ONCE FOR A CONSULTING
5 AGREEMENT. THAT IS THE EXACT OPPOSITE OF ALL THE PRECEDENT.

6 THE PRECEDENT IS VERY CLEAR. THE COURT IS SUPPOSED
7 TO CONSIDER THE POLICY IMPLICATIONS. IT'S SUPPOSED TO CONSIDER
8 THE EFFECT ON EXPERTS. IT'S SUPPOSED TO CONSIDER THE EFFECT ON
9 OTHER LITIGATIONS.

10 IF WE SET UP, WITHOUT ANY PRECEDENT, A NEW RULE OF
11 ANYONE WHO HAS EVER CONSULTED FOR THE DEFENDANT IS OUT OF THE
12 BOX, THEY KNOW EXACTLY WHAT THEY'LL DO. EVERY PERSON WHO
13 LEAVES THE FDA IS GOING TO GET THEIR ONE DAY AT AN ADVISORY
14 PANEL AND THEN THEY'LL BE GONE.

15 AND I THINK IN THIS TYPE OF CASE, PARTICULARLY SINCE
16 WE HAVE NOTHING SPECIFIC -- THE ACTUAL STANDARD HERE ARE
17 SPECIFIC AND UNAMBIGUOUS DISCLOSURES THAT IF REVEALED WOULD
18 PREJUDICE THE PARTY.

19 AND IT'S STRANGE HERE. WE HAVE NO IN-CAMERA
20 SUBMISSIONS. WE HAVE NO TESTIMONY. WE HAVE NO DECLARATIONS
21 WHATSOEVER. THERE IS NO BASIS TO ACTUALLY, FACTUALLY FIND
22 SOMETHING LIKE THAT.

23 YOU KNOW, THEIR BRIEF REFERENCES ALLEN MOSES. THEIR
24 BRIEF REFERENCES MICHELLE THOMPSON. WHERE ARE THEY? WHERE ARE
25 THEIR DECLARATIONS? WHERE IS ALLEN MOSES WITH A DECLARATION TO

1 YOUR HONOR, IN CAMERA, I TOLD ALEXANDER FLEMING X? AND IF
2 ALEXANDER FLEMING REVEALS X TO THE PLAINTIFFS, THIS WILL BE
3 PREJUDICIAL IN THE CASE. THERE IS NOT ONE EXAMPLE OF THAT.

4 THEIR OWN BRIEF DEPENDS ENTIRELY ON DOCUMENTS ALREADY
5 IN DISCOVERY. THAT'S NOT SOMETHING THAT IF REVEALED WOULD
6 PREJUDICE THE PARTY. THAT'S SOMETHING THE PARTY IS SUPPOSED TO
7 HAVE AND SUPPOSED TO LOOK AT.

8 SO I AM GETTING A LITTLE AFIELD FROM YOUR QUESTION.

9 **THE COURT:** IT'S ALL APPRECIATED. AND I DON'T WANT
10 YOU TO GET THE FEELING THAT I THINK INSIDER STATUS SOMEHOW
11 WOULD EQUATE TO A ONE-TIME CONSULT MEANS THEY ARE DISQUALIFIED.
12 I THINK THE INSIDER-STATUS-TYPE ARGUMENT REALLY IS MORE IN THE
13 PRONG OF PREJUDICE AS A RESULT OF WHAT RELEVANT INFORMATION IF,
14 IN FACT, SOME WAS, WOULD THEN PRODUCE.

15 SO I'M LOOKING AT IT VERY NARROWLY, AND I JUST DON'T
16 WANT YOU TO FEEL LIKE I AM SOMEHOW EXPANDING THE LAW. WE ARE
17 USING IT CATEGORICALLY AS AN ARGUMENT -- OR I THINK MR. BROWN
18 DID -- AND I THINK IT HAS SOME --

19 **MR. KENNERLY:** IF I MAY, YOUR HONOR.

20 **THE COURT:** -- SOME PIZZAZ IN TERMS OF PREJUDICE.

21 **MR. KENNERLY:** IF I MAY, YOUR HONOR, THEN THE
22 PREJUDICE TO US IS EVEN GREATER BECAUSE WHO AM I GOING TO CALL?
23 WHOEVER I CALL, AFTER THIS, ONCE THEY'VE KNOCKED EVERYONE OUT
24 OF THE BOX, THE FIRST THING THEY ARE GOING TO SAY IS YOU'VE
25 NEVER TESTIFIED FOR A DRUG COMPANY, HAVE YOU? AND YOU NEVER

1 WORKED IN A DRUG COMPANY, DID YOU? WHATEVER EXPERT WE HAVE, IF
2 THEY ARE ALLOWED TO HAVE SOMETHING LIKE THIS -- IF IT'S
3 PREJUDICIAL TO THEM FOR US TO HAVE SOMEONE THAT FORMERLY WORKED
4 FOR THEM, IT WILL BE PREJUDICIAL FOR US TO BE FORCED TO TAKE AN
5 EXPERT FROM A COMPLETELY DIFFERENT FIELD OR SOMEONE WITH NO
6 PHARMACEUTICAL INDUSTRY EXPERIENCE.

7 **THE COURT:** WELL, IT WOULD DEPEND. I MEAN, IF THE
8 FORMER EXPERT CONSULTED WITH THEM AND HAD SOME RELATIONSHIP TO
9 VICTOZA OR SOME OF THE OTHER DRUGS OF THE OTHER DEFENDANTS.
10 BUT THAT IS THE EXTREME. HERE, ONE COULD SAY WHAT ABOUT
11 DR. MICHAEL HAMRELL, THE JCCP PREEMPTION EXPERT?

12 **MR. KENNERLY:** WELL, YOUR HONOR, POSSIBILITY.
13 CERTAINLY, STANDING HERE TODAY, I WOULD SAY THE JCCP EXPERT IS
14 ALSO EQUALLY ONE OF THE BEST IN THE FIELD. BUT AT THE SAME
15 TIME ALL OF THIS GOES BACK TO THIS IS A TOUGH FIELD TO FIND
16 ANYBODY IN. THEY HAVE REPEATEDLY REFERENCED THE *PELLERIN* CASE.
17 THE *PELLERIN* CASE GRANTED DISQUALIFICATION BECAUSE --

18 **THE REPORTER:** COUNSEL, COULD YOU PLEASE SLOW DOWN.

19 **MR. KENNERLY:** -- THE EXPERT WAS NOTHING SPECIAL.
20 I'M SORRY. P-E-L-L-E-R-I-N.

21 **THE COURT:** AND SLOWER, TOO.

22 SO IN PELLERIN THEY GRANTED DISQUALIFICATION
23 BECAUSE -- AND I DIDN'T HEAR THE ENDING.

24 **MR. KENNERLY:** YES. BECAUSE THERE WAS NO SHOWING OR
25 ARGUMENT BY THE PLAINTIFF THAT THE EXPERT WAS ANYTHING OTHER

1 THAN NORMAL. THE COURT FOUND YOU CAN GO OUT AND GET ANYONE
2 ELSE TO FILL THIS ROLE. WHEN WE'RE TALKING ABOUT HOW THE FDA
3 WOULD RESPOND TO A CBE ON A DIABETES MEDICATION, WELL, THEN,
4 YOU'RE TALKING ABOUT A MUCH MORE NARROW FIELD THERE OF PEOPLE
5 WHO ARE POTENTIALLY QUALIFIED.

6 AND WHENEVER THERE ARE PLAINTIFFS' EXPERTS IN THESE
7 TYPES OF PHARMACEUTICAL CASES, THE DEFENDANT ALWAYS TRIES TO
8 MOVE TO PRECLUDE THEM, ALWAYS SAYS THEY ARE UNQUALIFIED FOR
9 EVERYTHING THAT THEY HAVE.

10 WE HAVE, HERE, THE PREEMINENT EXPERT IN THE FIELD,
11 SOMEONE WHO IS UNDENIABLY ABLE TO COMMENT ON ALL OF THESE
12 ISSUES. SO THE IDEA THAT WELL, IT'S PREJUDICIAL TO THEM
13 BECAUSE HE HAS EXPERIENCE IN THE DRUG INDUSTRY, NO. THAT'S
14 BENEFICIAL FOR THE COURT. IT'S BENEFICIAL FOR THE
15 FACT-FINDERS. HE KNOWS HOW THIS WORKS. HE KNOWS HOW THIS
16 SHOULD WORK.

17 **THE COURT:** OKAY. I THINK THE ARGUMENT IS A LITTLE
18 MORE -- DEEPER THAN YOU CHARACTERIZE, BUT I UNDERSTAND YOUR
19 POINT, CERTAINLY.

20 SO ANYTHING ELSE YOU WANT TO ADD, MR. KENNERLY?

21 **MR. KENNERLY:** NOT ON THIS POINT, YOUR HONOR.

22 **THE COURT:** SO, MR. BROWN, YOU WANT TO RESPOND AT ALL
23 OR DO YOU GIVE UP?

24 **MR. BROWN:** THANK YOU.

25 (LAUGHTER)

1 **THE COURT:** I GUESS YOU DON'T GIVE UP.

2 **MR. BROWN:** THANK YOU. FIRSTLY, I WILL ADDRESS THIS
3 IDEA THAT THERE IS NO PRECEDENT. THERE IS PRECEDENT,
4 SPECIFICALLY IN CALIFORNIA, WE THINK, THAT'S ANALOGOUS TO THIS
5 CASE.

6 THE *PELLERIN* CASE, AS WAS MENTIONED, THAT'S A FORMER
7 EMPLOYEE WHO SIGNED MULTIPLE CONFIDENTIALITY AGREEMENTS.
8 THAT'S IN THIS DISTRICT, 2012.

9 THE *ORACLE* CASE, IN THE NORTHERN DISTRICT IN 2012,
10 THAT WAS A FORMER CONSULTANT, LIKE DR. FLEMING, WHO SIGNED
11 MULTIPLE AGREEMENTS.

12 A THIRD CASE IN CALIFORNIA IS THE *ADVENTISTS* CASE,
13 WHICH WAS IN THE CENTRAL DISTRICT IN 2005. AGAIN, THAT WAS A
14 FORMER CONSULTANT IN THE CASE.

15 IN ALL OF THOSE CASES YOU HAD FORMER EMPLOYEES OR
16 CONSULTANTS HERE IN CALIFORNIA WHO WERE DISQUALIFIED FROM
17 TESTIFYING.

18 SECOND, THIS IDEA THAT HE'S SPECIAL AND THEY CAN'T
19 FIND ANOTHER EXPERT. WHAT MAKES HIM SPECIAL IN OUR JUDGMENT IS
20 THAT HE HAD ACCESS TO INFORMATION THAT HE ONLY GOT THROUGH THE
21 BREACH OF CONFIDENTIALITY AGREEMENTS.

22 HOWEVER, WE WILL ACKNOWLEDGE THAT DR. FLEMING DOES
23 HAVE SPECIALIZED KNOWLEDGE RELATING TO HOW THE FDA WORKS,
24 RELATING TO HOW HIS FORMER DIVISION WORKS, RELATED TO FDA
25 POLICIES, REGULATIONS AND PROCEDURES.

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1 IF WE JUST HAD A REPORT THAT SPOKE TO THOSE ISSUES,
2 IT WOULD BE A COMPLETELY DIFFERENT KETTLE OF FISH, BUT WE
3 DON'T. WHEN HE CROSSES OVER INTO ENDOCRINOLOGY AND INTO THE
4 INTERWORKINGS AND DATA OF OUR CLIENT, IT'S A DIFFERENT STORY.

5 FIRST, THERE ARE MANY DIFFERENT ENDOCRINOLOGISTS THAT
6 THE PLAINTIFFS CAN PICK ALL ACROSS THE COUNTRY. THEY DON'T
7 NEED DR. FLEMING ON THAT ISSUE OR ON CAUSATION. YOU HAVE TO
8 REMEMBER HE IS A DIABETOLOGIST OR ENDOCRINOLOGIST, AND WE'RE
9 TALKING ABOUT A CANCER ISSUE. WE KNOW THAT PLAINTIFFS HAVE
10 OTHER OPTIONS BECAUSE THEY HAVE ALREADY DISCLOSED OTHER EXPERTS
11 IN THIS CASE. FIVE OF THEM. AND MOST OF THOSE OTHER PEOPLE
12 HAVE MORE SPECIALIZED KNOWLEDGE RELATED TO THE CAUSATION AND
13 CANCER ISSUES THAN DR. FLEMING.

14 THEY HAVE IDENTIFIED A MOLECULAR BIOLOGIST. THEY
15 HAVE IDENTIFIED A PATHOLOGIST. AND THEY HAVE IDENTIFIED AN
16 ONCOLOGIST. ALL OF WHOM, IF PLAINTIFFS WISH, CAN HAVE THEM
17 ISSUE REPORTS AND SPEAK TO THE CAUSATION ISSUE. AND AS BEST I
18 CAN TELL, NONE OF THOSE EXPERTS HAD CONFIDENTIALITY AGREEMENTS
19 WITH OUR CLIENTS. SO THEY DO HAVE OTHER OPTIONS.

20 THE THIRD ISSUE -- AND THIS KIND OF GETS INTO A SLOG.
21 AND I'M NOT GOING TO GO THERE, UNLESS YOU THINK IT WILL BE
22 HELPFUL, YOUR HONOR. BUT I CAN GO BLOW-BY-BLOW THROUGH THESE
23 DOCUMENTS AND SHOW EXACTLY THE KIND OF INFORMATION THAT
24 DR. FLEMING WAS EXPOSED TO AND IDENTIFY EACH AND EVERY EXHIBIT.

25 BUT FROM A BIG-PICTURE PERSPECTIVE, I WOULD LOOK

1 BEYOND WHAT HE CALLS THE NOTEBOOK THAT WAS GIVEN TO HIM BEFORE
2 THESE MEETINGS. IT'S NOT JUST WHAT WAS GIVEN TO HIM BEFORE
3 THESE MEETINGS. IF YOU LOOK AT THE AGENDAS FOR EVERY ONE OF
4 THESE MEETINGS, THERE ARE PRESENTATIONS FROM NOVO PEOPLE AT
5 EVERY ONE OF THEM, WHERE THEY'RE DISCLOSING THEIR THOUGHTS,
6 THEIR DECISION-MAKING PROCESSES, THEIR INTERPRETATION OF DATA,
7 THEIR REGULATORY STRATEGIES, THEIR LABEL.

8 THEY ARE ALSO ASKING OTHER PEOPLE TO GIVE THEM
9 CONFIDENTIAL ADVICE. AND DR. FLEMING IS HEARING ALL OF THAT.
10 THROUGHOUT THE EXHIBITS, I CAN NAME EVERY ONE OF THEM.

11 YOU HAVE REFERENCES TO MANY DIFFERENT PIECES OF
12 INFORMATION THAT HE RECEIVED, GOING ALL THE WAY BACK TO 2000.
13 IN EXHIBIT 10, YOU HAVE DRAFTS, SYNOPSSES, LECTURES BY BOARD
14 MEMBERS, PRESENTATIONS FOR PLANS OF THE CLINICAL PROGRAM. I'LL
15 LIST ALL THE EXHIBITS JUST SO WE HAVE IT IN THE RECORD.

16 **THE COURT:** OKAY.

17 **MR. BROWN:** EXHIBITS 10, 11, 12, 13, 15, 16, 18, 23,
18 AND 24. YOU WILL SEE COUNTLESS REFERENCES TO INFORMATION,
19 INSIGHTS, THOUGHTS THAT WERE COMMUNICATED TO DR. FLEMING AND
20 OTHERS. THERE IS NO QUESTION THAT CONFIDENTIAL INFORMATION WAS
21 EXCHANGED.

22 HE WAS ALSO ON TELECOMS, WHERE HE IS TALKING ABOUT
23 FAST-TRACK APPROVAL AND LOOKING AT DRAFT APPLICATIONS FOR THE
24 APPROVAL OF VICTOZA.

25 AGAIN, YOU'RE GOING TO HAVE THE PLAINTIFFS IN THIS

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1 CASE SOMEHOW CRITICIZING THAT THESE DRUGS WERE RUSHED TO
2 MARKET, AND YOU HAVE A PERSON WHO IS INVOLVED DIRECTLY WITH THE
3 APPLICATION ITSELF. YOU WILL SEE THAT IN ALL OF THE EXHIBITS.

4 I ALSO WANTED TO POINT OUT -- JUST GOING TO THIS NO
5 EVIDENCE OF PANCREATIC CANCER. WE CERTAINLY CONTEND THERE IS
6 NO EVIDENCE THAT THESE DRUGS ARE LINKED TO PANCREATIC CANCER.

7 BUT THIS BETA CELL REGENERATION ISSUE IS A
8 SIGNIFICANT ONE. THE JULY 24TH, 2003 CONFIDENTIALITY AGREEMENT
9 IS SPECIFICALLY RELATED TO THE REGENERATION OF BETA CELLS,
10 WHICH IS THE PLAINTIFFS' THEORY OF THE CASE.

11 AND IF YOU LOOK AT EXHIBIT 12 -- WELL, I GAVE YOU THE
12 EXHIBITS BEFORE. BUT IN EXHIBIT 12, YOU'VE GOT A SPECIFIC
13 QUESTION BEING ASKED: WHAT ARE THE SAFETY CONCERNS FOR THIS
14 PRODUCT?

15 AND THERE IS ONE REFERENCE TO A CONDITION CALLED
16 NESIDIOBLASTOSIS, WHICH IS A RARE PANCREATIC CANCER. IT'S
17 RAISED. WE CERTAINLY DON'T BELIEVE THAT IT MEANS ANYTHING IN
18 TERMS OF A LINK BETWEEN THESE DRUGS AND PANCREATIC CANCER, BUT
19 THERE IS A REFERENCE TO IT. AND I SAID THERE IS MULTIPLE
20 REFERENCES TO THE ISSUE OF PANCREATITIS, TO THE EFFECTS THAT
21 THESE INCRETINS HAVE ON BETA CELLS, AND TO STUDIES WHICH
22 DR. FLEMING IS CRITICIZING. SO I THINK WE'VE GOT A LOT OF
23 INFORMATION IN THE DOCUMENTS THEMSELVES THAT ARE
24 CONTEMPORANEOUS.

25 THE OTHER THING I WANT TO POINT OUT -- BECAUSE THIS

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1 IDEA THAT WE NEED AN AFFIDAVIT TO PROVE SOMETHING WHEN WE HAVE
2 THE DOCUMENTS JUST ISN'T TRUE. BUT THERE IS ONE EXHIBIT IN
3 PARTICULAR THAT I THINK IS INTERESTING. AND IT'S A
4 CONTEMPORANEOUS DOCUMENT BY THE PERSON THAT MR. KENNERLY SAID
5 HE DEPOSED, MICHELLE THOMPSON.

6 EXHIBIT 23 IS AN E-MAIL FROM HER, WHERE SHE IS
7 SPECIFICALLY RAISING CONCERNS ABOUT PROPRIETARY INFORMATION
8 BEING GIVEN OUT TO THESE CONSULTANTS, AND SINGLING OUT
9 DR. FLEMING IN PARTICULAR. THAT'S EXHIBIT 23. AND I WILL GIVE
10 YOU THE DATE OF THAT DOCUMENT, AS WELL. IT'S OCTOBER 2004.

11 **THE COURT:** OKAY. NOW, MR. KENNERLY MADE SOME
12 REFERENCE TO WHERE IS THE BREACH, AND DOVETAILED THAT INTO THE
13 FACT THAT THESE AGREEMENTS SUNSET FOR A PERIOD, PERHAPS A YEAR
14 OR SO AFTER THEIR SIGNING. DOESN'T THAT UNDERCUT YOUR WHOLE
15 ARGUMENT, IN ESSENCE? IF THE AGREEMENTS SUNSET, THEN HOW COULD
16 THERE LATER BE BREACH?

17 **MR. BROWN:** I DON'T BELIEVE THAT'S TRUE WITH RESPECT
18 TO ALL OF THESE AGREEMENTS, YOUR HONOR. I WOULD HAVE TO LOOK
19 MORE CAREFULLY AT THAT. BUT THIS SUNSET IDEA IS THE FIRST TIME
20 I'VE HEARD OF INFORMATION THAT HE IS ALLOWED TO DISCLOSE AFTER
21 SOME PERIOD OF TIME. I'D LIKE TO LOOK CAREFULLY THROUGH THOSE
22 SEVEN AGREEMENTS, BUT THAT'S NEWS TO ME.

23 **THE COURT:** FIRST TIME I HEARD IT, TOO. THAT IS WHY
24 I'M ASKING YOU. I CAN GO THROUGH THEM, AS WELL.

25 OKAY. SO ANYTHING ELSE YOU WANT TO ADD? LET'S SEE

1 IF I HAVE ANY OTHER QUESTIONS WHILE I HAVE YOU AT THE PODIUM.
2 I THINK WE COVERED A GREAT DEAL OF ISSUES I WANTED TO NAIL
3 DOWN.

4 **MR. BROWN:** THE ONLY OTHER THING I WOULD POINT OUT,
5 YOUR HONOR, IS THE DEFENSE SHOULDN'T BE IN THE POSITION OF
6 HAVING TO PARSE WHAT COMES FROM DISCOVERY VERSUS WHAT COMES
7 FROM THIS CONFIDENTIAL RELATIONSHIP. THE *PELLERIN* CASE MAKES
8 REFERENCE TO THE INABILITY TO PARSE KNOWLEDGE AND THE FACT THAT
9 THE HUMAN BRAIN DOESN'T COMPARTMENTALIZE INFORMATION THIS WAY.

10 THE *ADVENTISTS* CASE ALSO RECOGNIZES THAT AN EXPERT
11 MAY BE SUBCONSCIOUSLY INFLUENCED BY INFORMATION OBTAINED DURING
12 A CONFIDENTIAL RELATIONSHIP. SO WE SHOULDN'T BE IN A POSITION
13 OF HAVING TO PARSE WHAT MIGHT HAVE COME FROM DISCOVERY VERSUS
14 WHAT MIGHT HAVE COME FROM THIS DECADE-LONG CONFIDENTIAL
15 RELATIONSHIP.

16 **THE COURT:** YET YOU ARE ABLE TO, IT SOUNDS LIKE, TO
17 ARTICULATE, CATEGORICALLY, AREAS THAT WOULD BE OF NO CONCERN
18 VERSUS AREAS OF GREAT CONCERN, WHICH YOU DID EARLIER.

19 **MR. BROWN:** YES. MY COLLEAGUES AND I TALKED ABOUT
20 THIS BEFORE THE ARGUMENT. CERTAINLY, WE WOULD LIKE TO CONSIDER
21 WHATEVER THE PROFFER IS SO WE COULD SEE WHAT A REPORT LOOKS
22 LIKE THAT DOESN'T TOUCH ON THE ISSUES THAT WE'RE CONCERNED
23 ABOUT.

24 BUT WE CERTAINLY WOULD BE OPEN-MINDED TO A REPORT
25 THAT ONLY TALKED ABOUT FDA REGULATIONS, WHAT'S HAPPENING INSIDE

1 THE AGENCY, PERHAPS HOW THE AGENCY LOOKS AT ISSUES LIKE THIS.

2 BUT ONCE YOU START GETTING INTO CAUSATION-RELATED
3 ISSUES AND FACTS RELATED TO OUR CLIENT AND APPLYING ANY OF THAT
4 TO NOVO NORDISK AND THE DEVELOPMENT OF THIS PRODUCT, WE BELIEVE
5 THAT YOU START TO RUN INTO SIGNIFICANT PROBLEMS.

6 **THE COURT:** OKAY. WELL, THANK YOU. THANK YOU.

7 MR. THOMPSON, (SIC) DID YOU WANT TO RESPOND TO THAT
8 OR ADD SOMETHING FURTHER ON YOUR SIDE OF THAT?

9 **MR. JOHNSON:** I DID, YOUR HONOR. AND AGAIN, MIKE
10 JOHNSON.

11 **THE COURT:** I'M SORRY. I JUST HEARD MICHELLE
12 THOMPSON SO I CHANGED YOUR NAME.

13 **MR. JOHNSON:** NOT A PROBLEM, YOUR HONOR. BOTH OF
14 THEM FAIRLY COMMON.

15 I JUST WANTED TO BRIEFLY ADDRESS THE ISSUE OF WHETHER
16 OR NOT THESE CONFIDENTIALITY AGREEMENTS HAVE SUNSETTED. AND,
17 QUITE FRANKLY, I DON'T THINK THAT WE EXPECTED THIS TO BE AN
18 ISSUE TODAY BECAUSE THE AGREEMENTS THEMSELVES ARE VERY CLEAR.

19 SO, FOR EXAMPLE, IF YOU LOOK AT EXHIBIT NUMBER 2, IT
20 IS THE FIRST CONFIDENTIALITY AGREEMENT. AND IT IS SIGNED
21 SEPTEMBER 4TH OF 1999. AND ON THE SECOND PAGE OF THAT
22 EXHIBIT -- AND THIS IS UNDER THE SECTION ENTITLED
23 "CONFIDENTIALITY" -- IT SAYS: RECIPIENT UNDERTAKES FROM THE
24 DATE OF DISCLOSURE TO TREAT ALL RECEIVED INFORMATION AS
25 STRICTLY CONFIDENTIAL FOR A PERIOD OF FIVE YEARS FROM THE DATE

1 OF DISCLOSURE. AND, THEREFORE, NOT TO DISCLOSE IT TO ANY THIRD
2 PARTY WITHOUT THE PRIOR WRITTEN AND EXPRESS CONSENT OF NOVO,
3 AND TO MAKE NO USE OF IT EXCEPT AS SPECIFICALLY PROVIDED FOR IN
4 ARTICLE IV, WITHOUT THE PRIOR WRITTEN AND EXPRESS CONSENT OF
5 NOVO IN EACH CASE.

6 SO IN THAT FIRST AGREEMENT WE LOOK AT IT HAS A SUNSET
7 PROVISION, YOUR HONOR, OF FIVE YEARS.

8 WE THEN GO TO EXHIBIT NUMBER 3. THE DATE OF -- THE
9 FIRST ONE, AGAIN, YOUR HONOR, WAS SIGNED ON SEPTEMBER 4TH OF
10 1999.

11 SO WE GO TO THE SECOND ONE, WHICH IS EXHIBIT
12 NUMBER 3, AND THAT WAS SIGNED JANUARY 20TH OF 2000. AND, YOUR
13 HONOR, I'M NOT GOING TO READ ALL OF THESE, BUT I'M GOING TO
14 REPRESENT THAT THIS ONE ALSO HAS THE CONFIDENTIALITY SECTION.
15 AND IT IS LIMITED TO FIVE YEARS FROM THE DATE OF DISCLOSURE.

16 YOUR HONOR, WE THEN GO TO EXHIBIT NUMBER 4. AND
17 EXHIBIT NUMBER 4 IS THE THIRD CONFIDENTIALITY AGREEMENT. AND
18 IT HAS A SECTION -- I'M SORRY -- IT IS SIGNED MAY 9TH OF 2003.
19 AND IT HAS A SECTION CALLED "TERMINATION." AND IT SAYS: THIS
20 AGREEMENT SHALL COME INTO FORCE ON THE DATE OF THE LAST
21 SIGNATURE ADHERED TO AND SHALL REMAIN EFFECTIVE UNTIL FIVE
22 YEARS AFTER LAST SIGNING.

23 THIS ONE, AGAIN, HAS A SUNSET PROVISION OF FIVE
24 YEARS.

25 THE NEXT AGREEMENT, YOUR HONOR, IS EXHIBIT NUMBER 5,

1 WHICH WOULD BE THE FOURTH CONFIDENTIALITY AGREEMENT. AND THAT
2 WAS ENTERED INTO ON JULY 3RD OF 2014. AND DR. FLEMING SIGNED
3 IT ON -- AND I'M SORRY. THAT IS 2003. AND DR. FLEMING SIGNED
4 IT, IT LOOKS LIKE, ON JULY 24TH OF 2003. AND THAT ONE HAS A
5 PROHIBITED ACT SECTION. AND THAT ONE SAYS: THE RECIPIENT
6 UNDERSTANDS AND AGREES THAT FOR A PERIOD OF FIVE YEARS FROM THE
7 RECEIPT OF ANY CONFIDENTIAL INFORMATION, SUCH CONFIDENTIAL
8 INFORMATION SHALL --

9 AND YOUR HONOR, IT GOES ON FOR MULTIPLE PARAGRAPHS.
10 I'M NOT GOING TO READ THOSE INTO THE RECORD. BUT, AGAIN, THE
11 POINT IS IS THAT IT HAS A SUNSET PROVISION OF FIVE YEARS.

12 YOUR HONOR, EXHIBIT NUMBER 6 WOULD BE THE
13 FIFTH CONFIDENTIALITY AGREEMENT. THAT WAS EXECUTED ON
14 SEPTEMBER 26TH OF 2003. THAT ALSO HAS A TERMINATION AGREEMENT
15 THAT SUNSETS AFTER FIVE YEARS.

16 YOUR HONOR, THE NEXT AGREEMENT IS EXECUTED ON
17 DECEMBER 20TH OF 2007. AND THIS ONE SAYS: THE AGREEMENT SHALL
18 COMMENCE AND HAVE A TERM OF ONE YEAR, TO EXPIRE DECEMBER 31ST
19 OF 2008.

20 AND THEN, YOUR HONOR, THE FINAL ONE, WHICH IS AN
21 ADDENDUM TO A HEALTHCARE PROFESSIONAL CONSULTING AGREEMENT --
22 WHICH I'M NOT POSITIVE, BUT I THINK WAS THE PRECEDING ONE,
23 WHICH I BELIEVE WOULD BE THE SEVENTH AGREEMENT THAT COUNSEL
24 REFERRED TO -- THAT WAS EXECUTED ON OCTOBER 9TH OF 2008. AND
25 THAT ONE, AGAIN, REFERRED BACK TO THE PRIOR ONE, WHICH HAD AN

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1 AGREEMENT OF ONE YEAR. AND IT SAYS: EXCEPT AS OTHERWISE
2 PROVIDED HEREIN ALL TERMS AND CONDITIONS OF THE CONSULTING
3 AGREEMENT REMAIN IN FULL FORCE AND EFFECT.

4 SO REGARDLESS, EVEN IF IT WENT BACK TO ONE OF THE
5 FIVE-YEAR ONES, IT WOULD STILL HAVE SUNSETTED BEFORE
6 DR. FLEMING'S INVOLVEMENT IN THIS CASE.

7 YOUR HONOR, I DON'T KNOW IF MR. KENNERLY HAD ANYTHING
8 ADDITIONAL TO ADD, BUT I JUST WANTED TO CLARIFY, FOR THE
9 RECORD, THE STATUS OF THE CONFIDENTIALITY AGREEMENTS FROM THE
10 PLAINTIFFS' PERSPECTIVE.

11 **THE COURT:** THANK YOU. I APPRECIATE THAT.

12 MR. KENNERLY, DO YOU HAVE ANYTHING TO ADD?

13 **MR. KENNERLY:** IF I MAY, YOUR HONOR. WHAT I WANTED
14 TO GET TO WAS THE WAY THAT MR. BROWN DESCRIBED IT OF HE DIDN'T
15 THINK THAT THEY SHOULD HAVE TO PARSE THROUGH TO FIND WHAT MIGHT
16 PREJUDICE THEM DOWN THE LINE.

17 NOW, FIRST, JURORS EVERY DAY ARE ASKED TO PARSE
18 THROUGH TREMENDOUS AMOUNTS OF DETAILED INFORMATION TO DECIDE
19 THE QUESTIONS BEFORE THEM. THE CASE LAW HERE IS UNEQUIVOCAL.
20 IT IS A HEAVY BURDEN ON THE MOVING PARTY TO JUSTIFY THE EXTREME
21 SANCTION. THESE ARE COMMON TERMS IN THESE CASES OF
22 DISQUALIFICATION THROUGH SPECIFIC AND UNAMBIGUOUS DISCLOSURES.

23 I THINK THE CONCESSION THAT THEY CAN'T DO THIS, THAT
24 INSTEAD IT'S SUPPOSED TO BE A GESTALT OF POTENTIAL KNOWLEDGE IS
25 AN ADMISSION THAT THEY CANNOT MEET THE ACTUAL ELEMENTS OF HERE,

1 WHICH IS SPECIFIC INFORMATION ABOUT IT.

2 THE IDEA THAT THEY COULD DO A BLOW-BY-BLOW THROUGH
3 THE EXHIBITS -- AS YOUR HONOR NOTED, THE EXHIBITS ARE ALL IN
4 DISCOVERY. HOW COULD YOU BE PREJUDICED BY CONFIDENTIAL
5 INFORMATION IN DISCOVERY?

6 AND AGAIN, MUCH OF WHAT THEY ARE REFERENCING --
7 DR. FLEMING SAW AGENDA ITEMS, HE SAW PRESENTATIONS, HE WAS
8 THERE FOR DISCUSSIONS -- THAT IS IN THE MATERIALS DEFENDANTS
9 THEMSELVES ATTACHED.

10 THERE IS NO SPECIAL KNOWLEDGE IN THERE. AND EVEN IF
11 THERE WAS, IT'S PART OF THE DISCOVERY. SO THE IDEA, I GUESS,
12 IS DR. FLEMING HAD A CONVERSATION OUTSIDE, AT, LIKE, A
13 RESTAURANT, WITH SOMEONE ELSE THERE AND SUDDENLY LEARNED
14 SOMETHING THERE. THE IDEA THAT THAT INFORMATION IN DISCOVERY
15 IS SOMEHOW ALSO CONFIDENTIAL AND PRIVILEGED, I DON'T THINK CAN
16 CARRY THE DAY.

17 AND IF YOU LOOK AT THE CASES THEY ARE RELYING ON, WE
18 DEAL WITH *ORACLE* AND *ADVENTISTS* ON PAGE SIX OF OUR BRIEF.
19 THERE ARE INTELLECTUAL PROPERTY CASES IN WHICH THE EXPERT WAS
20 HEAVILY INVOLVED IN IT. *THE ORACLE* CASE, JUST TO NARROW DOWN
21 ON ONE ISSUE ON IT, HAD A DECLARATION FROM THE COMPANY'S VP,
22 VERY SPECIFICALLY DELINEATING EXACTLY WHAT THAT INDIVIDUAL
23 KNEW, WHAT HE LEARNED, THAT HE HAD INFORMATION THAT HAD NOT
24 BEEN SHARED WITH THE OTHER PARTY.

25 AND THAT WAS ONLY ONE ELEMENT OF WHAT THE COURT WENT

1 THROUGH IN ORDER TO FIND DISQUALIFICATION. IT ALSO FOUND IT AS
2 A RESULT OF HIS CO-INVENTOR STATUS.

3 SO AGAIN, THE DEFENDANTS' ARGUMENTS HERE ARE JUST TOO
4 FAR OFF OF THE EXISTING CASE LAW AND WHAT IS THEIR BURDEN TO
5 PROVE. THEY DO HAVE TO PARSE THROUGH IT. AND THEY MUST SHOW
6 YOUR HONOR WHAT SPECIFIC AND UNAMBIGUOUS DISCLOSURES, IF
7 REVEALED TO US, WOULD PREJUDICE THEM.

8 AND THAT'S IT ON THOSE POINTS.

9 **THE COURT:** AND ANYONE ELSE ON THE PLAINTIFFS' TEAM
10 WANT TO ADD ANYTHING BEFORE I TURN TO THE DEFENSE, GENERALLY,
11 AND GIVE THEM ALL A CHANCE, TOO?

12 **MR. SHKOLNIK:** NO, YOUR HONOR.

13 **THE COURT:** IT SEEMS LIKE NOT.

14 MR. BROWN, ANYTHING FURTHER YOU WOULD LIKE TO ADD ON
15 NOVO'S BEHALF?

16 **MR. BROWN:** JUST BRIEFLY, YOUR HONOR. FIRSTLY, IT'S
17 A BIT UNFAIR TO BE RESPONDING TO THIS SUNSET ARGUMENT FOR THE
18 FIRST TIME IN AN ORAL ARGUMENT.

19 **THE COURT:** I UNDERSTAND.

20 **MR. BROWN:** THIS WAS NEVER MENTIONED, NOT A WORD OF
21 IT, IN THE BRIEFING. AND WE CERTAINLY WOULD HAVE BEEN ABLE TO
22 ADDRESS THIS IN GREAT DETAIL HAD WE HAD AN OPPORTUNITY TO
23 RESPOND, A FAIR OPPORTUNITY TO RESPOND.

24 WITH THAT SAID, JUST GOING THROUGH SOME OF THE THESE
25 AGREEMENTS VERY QUICKLY. AND THIS IS NOT GOING TO BE A

1 COMPREHENSIVE JOB, BUT JUST TO GIVE YOU AN EXAMPLE OF WHAT
2 WE'RE TALKING ABOUT.

3 IF YOU LOOK AT THE JUNE 2003 AGREEMENT, AND YOU GO TO
4 ARTICLE II, WHICH IS CONFIDENTIALITY, SECTION 2.1, YOU WILL SEE
5 THAT THE INTENT IS TO MAKE ALL OF THIS INFORMATION STRICTLY
6 CONFIDENTIAL DURING THE TERM OF THIS AGREEMENT AND THEREAFTER.
7 THAT'S ONE THAT I LOOKED AT.

8 **THE COURT:** IS THAT EXHIBIT 4?

9 **MR. BROWN:** I DON'T HAVE THE EXHIBIT NUMBER ON THAT
10 ONE, BUT IT'S THE JUNE 11, 2003 AGREEMENT.

11 **THE COURT:** OKAY.

12 **MR. BROWN:** AND THEN IF YOU LOOK AT, AGAIN, THE
13 JUNE 25, 2007 AGREEMENT, IT'S THE SAME LANGUAGE: TO TREAT ALL
14 INFORMATION STRICTLY CONFIDENTIAL DURING THE TERM OF THIS
15 AGREEMENT AND THEREAFTER.

16 IF YOU LOOK AT THE AGREEMENT DATED DECEMBER 20, 2007,
17 FOR EXAMPLE, THERE IS NO SUNSET RELATED TO CONFIDENTIAL
18 INFORMATION: CONSULTANT UNDERSTANDS AND AGREES THAT
19 CONFIDENTIAL INFORMATION SHALL AT ALL TIMES REMAIN THE SOLE
20 PROPERTY OF NOVO NORDISK.

21 THIS IS SOMETHING THAT WE'D CERTAINLY BE HAPPY TO
22 BRIEF FURTHER, IF GIVEN THE OPPORTUNITY, IF THIS IS SOMETHING
23 THAT IS OF INTEREST TO YOUR HONOR.

24 **THE COURT:** OKAY. WELL, THANK YOU. LET ME THINK
25 ABOUT THAT.

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1 AND I KNOW THE OTHER DEFENDANTS JOIN IN THE MOTION.
2 IS THERE ANYTHING ANY OF THEM WOULD LIKE TO SAY ON ANY OF THE
3 ISSUES WE'VE DISCUSSED, ISSUES WE HAVEN'T DISCUSSED, OR STILL
4 THINGS WE WILL BE FOCUSING ON IN THE RULING?

5 YES, SIR.

6 **MR. BOEHM:** YOUR HONOR, PAUL BOEHM REPRESENTING
7 MERCK. ALTHOUGH PLAINTIFFS FILED ONLY ONE OPPOSITION BRIEF
8 BEFORE THE COURT THIS AFTERNOON, THERE ARE ACTUALLY TWO
9 DISTINCT AND SEPARATE MOTIONS TO DISQUALIFY DR. FLEMING. IF
10 THE COURT HAS QUESTIONS OR WISHES TO HEAR ARGUMENT ABOUT THE
11 SECOND OF THOSE MOTIONS, WHICH CONCERNS THE ISSUE OF
12 CONFIDENTIAL MATERIAL THAT WAS PROVIDED BY PLAINTIFFS' COUNSEL
13 TO DR. FLEMING CONTRARY TO THE TERMS OF THE PROTECTIVE ORDER,
14 THEN WE WOULD BE HAPPY TO ADDRESS THAT MOTION, AS WELL.

15 **THE COURT:** YOU KNOW, I HAVE THAT ONE FAIRLY WELL IN
16 MIND, ALTHOUGH THE TWO ARE SO INTIMATELY CONNECTED, IT'S
17 PROBABLY NOT A FAIR STATEMENT. IF THERE IS ANYTHING YOU WANT
18 TO STRESS OR POINT OUT, I WILL GIVE YOU THAT OPPORTUNITY, BUT I
19 DON'T HAVE ANY SPECIFIC QUESTIONS.

20 SHORT OF STRIKING THE REPORT, WHAT OTHER SANCTION
21 WOULD BE APPROPRIATE FOR A VIOLATION OF THE PROTECTIVE ORDER
22 HERE? AND I SAY THAT IN THE CONTEXT OF STRIKING THE REPORT
23 BEING A VERY DRASTIC REMEDY, WITH THE COURTS TENDING TO WANT TO
24 LOOK FOR OTHER VIABLE AND PERHAPS NOT AS DRASTIC APPROACHES TO
25 THINGS LIKE SANCTIONS. I MEAN, WHAT ELSE COULD WE DO?

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1 **MR. BOEHM:** YES, YOUR HONOR. FIRST, IF I COULD
2 ADDRESS THE IMPORTANT DISTINCTIONS BETWEEN THE TWO MOTIONS.

3 **THE COURT:** OF COURSE.

4 **MR. BOEHM:** NOVO'S MOTION, AS YOU JUST HEARD,
5 CONCERNS CONFIDENTIAL INFORMATION THAT NOVO PROVIDED TO
6 DR. FLEMING OVER THE COURSE OF MANY YEARS.

7 THE SECOND MOTION BEFORE THE COURT TODAY CONCERNS
8 CONFIDENTIAL INFORMATION THAT PLAINTIFFS PROVIDED TO
9 DR. FLEMING -- DOCUMENTS THAT COUNSEL PROVIDED TO DR. FLEMING
10 UNDER THE TERMS OF THE PROTECTIVE ORDER.

11 WITH RESPECT TO THE VIOLATION THAT WE BELIEVE
12 OCCURRED WHEN PLAINTIFFS' COUNSEL PROVIDED THOSE CONFIDENTIAL
13 DOCUMENTS TO DR. FLEMING WITHOUT PROVIDING ADVANCE NOTICE TO
14 DEFENDANTS PURSUANT TO THE TERMS OF THE PROTECTIVE ORDER, THE
15 COURT HAS BEFORE IT A RANGE OF POSSIBLE REMEDIES AND BROAD
16 DISCRETION IN DECIDING WHICH OF THOSE REMEDIES ARE
17 PROPORTIONATE AND APPROPRIATE.

18 WHEN YOU LOOK AT THE CASE LAW, COURTS CONSIDER
19 POSSIBLE SANCTIONS, INCLUDING MONETARY SANCTIONS,
20 DISQUALIFICATION; AND, INDEED, IN SOME CASES, DISQUALIFICATION
21 WITHOUT LEAVE TO REPLACE THE DISQUALIFIED EXPERT.

22 WE'VE REQUESTED IN THIS CASE THAT DR. FLEMING BE
23 DISQUALIFIED AS THE APPROPRIATE AND PROPORTIONATE REMEDY
24 BECAUSE ALTHOUGH IT DOESN'T MAKE DEFENDANTS ENTIRELY WHOLE, IT
25 DOES RELIEVE DEFENDANTS OF THE IMPOSSIBLE POSITION THAT THEY

1 OTHERWISE WOULD BE PLACED IN IF DR. FLEMING WERE NOT
2 DISQUALIFIED.

3 IT WOULD BE -- PARTICULARLY IN LIGHT OF THE FACT THAT
4 PLAINTIFFS HAVE BEEN TELLING US, AND HAVE NOW INFORMED THE
5 COURT, THAT THEY INTEND TO DESIGNATE DR. FLEMING AS THE GENERAL
6 CAUSATION EXPERT, IT WOULD BE VERY DIFFICULT, IF NOT
7 IMPOSSIBLE -- SHOULD I PAUSE, YOUR HONOR?

8 (TELEPHONE INTERRUPTION)

9 **THE COURT:** YES. LET'S SEE.

10 IS THAT YOUR IPHONE, JEANNETTE?

11 **THE REPORTER:** NO. IT'S SOMEBODY ON THE PHONE.

12 **THE COURT:** BECAUSE YOU'RE ALWAYS LISTENING TO MUSIC,
13 I FIGURE YOU'RE SIMILARLY DOING IT HERE. JUST KIDDING.

14 (LAUGHTER)

15 **THE REPORTER:** NO, IT'S SOMEONE ON THE PHONE.

16 **THE COURT:** IT'S SOMEONE ON THE PHONE. IF ANYONE IS
17 ON THE PHONE, HAVING ANY SEPARATE CONVERSATIONS, PLEASE SUSPEND
18 IT FOR NOW. MAYBE EVERYBODY ON THE PHONE SHOULD PUT THEIR
19 PHONES ON MUTE SO WE CAN HEAR, AND MAYBE THAT WILL TAKE THIS
20 FEEDBACK OUT OF THIS.

21 (PAUSE)

22 WE MAY BE THERE.

23 **MR. BOEHM:** IT SOUNDS NICE.

24 **THE COURT:** GO AHEAD.

25 **MR. BOEHM:** YOUR HONOR, DR. FLEMING HAS SUBMITTED A

1 REPORT AND IT'S 108 PAGES LONG.

2 **THE COURT:** I KNOW.

3 **MR. BOEHM:** AND IT TOUCHES ON A VARIETY OF ISSUES,
4 VIRTUALLY EVERY MEDICAL AND SCIENTIFIC ISSUE THAT'S CONCEIVABLY
5 TO BE ADDRESSED IN THE LITIGATION IN SOME FORM OR FASHION.

6 IT WOULD BE DIFFICULT, IF NOT IMPOSSIBLE, FOR
7 DEFENDANTS TO CROSS-EXAMINE DR. FLEMING ABOUT HIS OPINIONS AND
8 THE MATERIALS THAT HE RELIES UPON IN HIS REPORT WITHOUT
9 FOCUSING ADDITIONAL ATTENTION ON THE VERY CONFIDENTIAL
10 DOCUMENTS THAT NEVER SHOULD HAVE BEEN PROVIDED TO HIM. AND
11 POSSIBLY, IF THE CROSS-EXAMINATION IS TO BE FULSOME AND
12 ROBUST -- POSSIBLY NEEDING TO DIVULGE ADDITIONAL CONFIDENTIAL
13 INFORMATION TO DR. FLEMING THAT HE HAS NOT YET EVEN SEEN.

14 NOW, IT'S COME UP TODAY THAT MAYBE THERE COULD BE AN
15 ALTERNATIVE REMEDY. AND THAT IS ONE THAT WE SUGGESTED AS A
16 POSSIBILITY, AS WELL, IN OUR BRIEFING. AND THAT IS THAT
17 DR. FLEMING'S REPORT BE STRICKEN. IF YOU LOOK AT THAT 108-PAGE
18 REPORT, APPROXIMATELY THREE TO FIVE PAGES OF IT ACTUALLY DEAL
19 WITH THE ISSUE OF PREEMPTION. AND OVER 100 PAGES OF IT DEALS
20 WITH GENERAL CAUSATION.

21 NOW, IF THAT'S THE REPORT WE WERE DEALING WITH, THE
22 THREE-TO-FIVE-PAGE REPORT, WE WOULD BE IN A DIFFERENT POSITION,
23 AS MR. BROWN NOTED. AND ALTHOUGH I DON'T KNOW THAT THE
24 EQUITIES WOULD BE COMPLETELY SET IN EQUIPOISE, I THINK IT WOULD
25 GO A LONG WAY.

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1 AND FINALLY, YOUR HONOR, IN WEIGHING ALL OF THE
2 EQUITIES, I WOULD URGE THE COURT TO CONSIDER THE ISSUE OF
3 PRECEDENT HERE, BOTH IN THIS CASE AND BEYOND. THE PROTECTIVE
4 ORDER SHOULD NOT BE MADE INTO A PAPER TIGER. THAT IS TRUE IN
5 EVERY CASE, OF COURSE, BUT IT'S PARTICULARLY TRUE IN THIS CASE,
6 WHERE WE HAVE IN THE SINGLE MDL FOUR SEPARATE COMPETITOR
7 PHARMACEUTICAL COMPANIES. AND THAT'S A SENSITIVITY THAT THE
8 JPML EXPRESSLY REFERENCED WHEN IT ESTABLISHED THIS MDL.

9 THE PROTECTIVE ORDER NEEDS TO BE TAKEN SERIOUSLY.
10 THAT'S WHAT WE'RE ASKING THIS COURT TO DO WITH THIS MOTION.

11 **THE COURT:** OKAY. TWO QUESTIONS, IF I MAY?

12 **MR. BOEHM:** SURE.

13 **THE COURT:** THE CONFIDENTIAL INFORMATION TO WHICH
14 YOU'RE REFERRING, IS THAT ESSENTIALLY THE INFORMATION OF
15 NOVO'S? IT'S THE INFORMATION THAT YOU'VE PROVIDED OTHERWISE
16 THROUGH DISCOVERY THAT IS GOTTEN OUT OF THE LOOP, ESSENTIALLY?

17 **MR. BOEHM:** THAT'S CORRECT. THE ISSUE THAT IS REALLY
18 AT THE CORE OF THIS IS THAT DR. FLEMING IS NOT JUST AN EXPERT
19 IN THIS LITIGATION. HE IS THE FOUNDER AND THE CHIEF MEDICAL
20 OFFICER OF ANOTHER PHARMACEUTICAL COMPANY CALLED "EXSULIN."
21 AND THAT'S CONCEDED. THERE IS NO DISPUTE THAT EXSULIN MAKES
22 AND CURRENTLY IS TESTING IN HUMANS AN ANTI-DIABETES MEDICATION
23 THAT IS DESIGNED TO COMPETE DIRECTLY WITH INCRETIN-BASED
24 THERAPIES, SUCH AS THE VERY DRUGS THAT ARE AT ISSUE IN THIS
25 CASE.

1 NOW, PLAINTIFFS' COUNSEL, IN THEIR OPPOSITION BRIEF,
2 HAVE SAID WELL, DR. FLEMING AND EXSULIN, THEY ARE NOT
3 COMPETITORS BECAUSE THAT DRUG IS STILL BEING TESTED. IT'S NOT
4 YET ON THE MARKET; AND, THEREFORE, THEY ARE NOT A MANUFACTURER.

5 THE PROTECTIVE ORDER DEFINES COMPETITOR AS A
6 MANUFACTURER OR A SELLER. IF THE TERM "MANUFACTURER" IN THE
7 PROTECTIVE ORDER, BY DEFINITION, ONLY INCLUDED MANUFACTURERS
8 WHO ALSO SOLD, IT WOULD MAKE NO SENSE. IT WOULD BE COMPLETELY
9 REDUNDANT FOR THE PROTECTIVE ORDER TO SAY MANUFACTURER OR
10 SELLER.

11 I WOULD ALSO JUST NOTE, YOUR HONOR, WE LOOKED AGAIN
12 THIS MORNING AT EXSULIN'S WEBSITE THAT IS USED TO PROMOTE
13 ITSELF TO THE PUBLIC AND TO INVESTORS. AND I WANT TO QUOTE
14 DIRECTLY FROM WHAT IS STILL THERE AS OF TODAY.

15 QUOTE, FOR THE LAST THREE YEARS EXSULIN'S FOUNDERS
16 OPERATED UNDER THE RADAR TO ACHIEVE CRITICAL MILESTONES IN
17 MANUFACTURING, FORMULATION, ANIMAL STUDIES, AND CLINICAL TRIAL
18 PREPARATIONS.

19 HERE IS THE ISSUE: THAT PROVISION IN THE PROTECTIVE
20 ORDER THAT REQUIRES PLAINTIFFS' COUNSEL TO GIVE US NOTICE IF
21 THEY WANT TO SHARE OUR CONFIDENTIAL INFORMATION WITH A
22 COMPETITOR IS THERE SO THAT PLAINTIFFS' COUNSEL DON'T HAVE THE
23 RIGHT TO MAKE THAT DECISION ALL ON THEIR OWN. AT A MINIMUM, WE
24 SHOULD GET NOTICE, WE SHOULD HAVE THE OPPORTUNITY TO RESPOND;
25 AND, IF NECESSARY, TO BRING A MOTION BEFORE THE COURT.

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1 WE DIDN'T HAVE THAT OPPORTUNITY. THERE WAS AN
2 END-RUN THAT WAS MADE, AND THAT OUGHT TO BE RECTIFIED.

3 IN THIS CASE, THE APPROPRIATE REMEDY, BECAUSE IT
4 WOULD BE IMPOSSIBLE TO CROSS-EXAMINE HIM ROBUSTLY WITHOUT
5 DIVULGING ADDITIONAL CONFIDENTIAL INFORMATION OR FOCUSING
6 ADDITIONAL ATTENTION ON THE CONFIDENTIAL INFORMATION THAT
7 ALREADY HAS BEEN PROVIDED TO DR. FLEMING, DISQUALIFICATION IS
8 APPROPRIATE OR, AT A MINIMUM, HIS REPORT SHOULD BE STRICKEN AND
9 WE SHOULD BE DEALING WITH THE THREE-TO-FIVE PAGES OF IT THAT
10 ACTUALLY CONCERN THE ISSUE THAT WE WERE SUPPOSED TO BE FOCUSED
11 ON, WHICH IS THE NARROW ONE OF PREEMPTION.

12 **THE COURT:** GREAT. THANK YOU.

13 AND ANY OTHER OF THE DEFENDANTS WANT TO WEIGH IN OR
14 JUST SUBMIT ON THE COMMENTS OF YOUR COLLEAGUES?

15 **MR. KING:** NO, YOUR HONOR.

16 **THE COURT:** AND THEN, MR. KENNERLY, YOU WANT TO TAKE
17 THE RESPONSE ON THAT, AS WE REALLY ARE FOCUSING MORE NOW ON THE
18 PROTECTIVE ORDER ASPECT OF THE MOTIONS THAT ARE HERE TODAY?

19 **MR. KENNERLY:** YES, YOUR HONOR. FIRST, THEY GOT THE
20 LAST WORD IN BRIEFING WITH THE REPLY. SO I WANT TO ADDRESS A
21 COUPLE ISSUES IN THERE; AND, OF COURSE, BE ABLE TO ADDRESS A
22 NUMBER OF HIS REMARKS.

23 AND I NOTICED FOOTNOTE TWO OF THEIR REPLY REFERENCED
24 THE DICTIONARY, THE OLD STANDBY IN LEGAL ARGUMENTS. SO I
25 PULLED UP THE DICTIONARY AND LOOKED UP THE COMPETITOR.

1 COMPETITOR IS ONE WHO BUYS OR SELLS IN THE SAME MARKET.

2 THAT IS NOT A MINOR ISSUE HERE. EXSULIN DOES NOT
3 MANUFACTURE OR SELL PRESCRIPTION MEDICATIONS. THAT'S THE
4 LANGUAGE OF THE PROTECTIVE ORDER: MANUFACTURER OR SELLER OF
5 PRESCRIPTION MEDICATIONS. THEIR EXPERIMENTAL DRUG CANNOT BE
6 PRESCRIBED TO ANYONE. IT CANNOT POSSIBLY COMPETE WITH ANYTHING
7 SOLD BY MERCK, ANYTHING SOLD BY NOVO, ANYTHING SOLD BY ELI
8 LILLY, ANYTHING SOLD BY AMYLIN. THEY ARE SIMPLY NOT A
9 COMPETITOR.

10 THE WAY THESE MARKETS WORK IS YOU HAVE THESE SMALLER
11 DEVELOPMENT COMPANIES. THEY TEND TO GET GOBBLED UP OR THEY
12 HAVE SOME SORT OF JOINT VENTURE DOWN THE LINE. THIS ISN'T A
13 COMPETITIVE USE OF IT; IT'S A DIFFERENT FIELD OF IT ENTIRELY.

14 AND AGAIN, IF THEY WANTED TO HAVE MANUFACTURER OR
15 SELLER OR RESEARCHER OR DEVELOPER OF ANY DRUG THAT COULD
16 POTENTIALLY BE USED TO TREAT ANY MEDICAL CONDITION, THEY COULD
17 HAVE PUT THAT IN THERE.

18 INSTEAD, THEY CHOSE VERY SPECIFICALLY: A
19 MANUFACTURER OR SELLER OF A PRESCRIPTION MEDICATION. THEY
20 DIDN'T SAY A DEVELOPMENTAL MEDICATION. THEY DIDN'T SAY AN
21 EXPERIMENTAL MEDICATION. THESE ARE ALL STANDARD TERMS IN THEIR
22 FIELD. THEY CHOSE PRESCRIPTION MEDICATION. SOMETHING THAT
23 DOES NOT EXIST UNTIL YOUR NDA IS APPROVED BY THE FDA.

24 THERE WAS ANOTHER ARGUMENT WHICH PLAYS INTO WHAT HE
25 WAS SAYING ABOUT HOW OUR REPORT SHOULD BE THREE PAGES. WELL,

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1 IF YOU TAKE THEIR VIEW OF PREEMPTION IS NOT FACT-INTENSIVE,
2 PREEMPTION DOES NOT REQUIRE LOOKING AT MUCH, THAT PREEMPTION
3 CAN BE DONE ON THE BASIS OF ONE ARTICLE, THEN I SUPPOSE SO.

4 BUT THE TRUTH IS THAT IS NOT WHAT THE LAW ALLOWS.
5 THE LAW DECIDES PREEMPTION IS FACT-INTENSIVE. IT IS THEIR
6 BURDEN. IT IS USUALLY VERY HEAVY. IT HAS A LOT OF TESTIMONY
7 AND A LOT OF DOCUMENTS. AND THIS PLAYS INTO THEIR CONTENTION
8 THEY WERE SURPRISED THAT OUR EXPERT LOOKED AT DISCOVERY.

9 WELL, OF COURSE OUR EXPERT LOOKED AT DISCOVERY. THAT
10 WAS THE PURPOSE OF THE DISCOVERY, WAS TO FIND THE FACTUAL
11 INFORMATION FOR THE FACT-INTENSIVE AFFIRMATIVE DEFENSE THAT
12 THEY'RE BRINGING. SO THAT IS WHAT THE EXPERT HAS LOOKED AT.
13 THAT IS WHAT THE COURT NEEDS TO LOOK AT.

14 IF WE HAD HAD OUR EXPERT SAY I LOOKED AT ONE
15 DOCUMENT -- OR, LIKE THEIR EXPERT. THEIR EXPERT LOOKED AT, I
16 THINK, THREE DOCUMENTS. I DON'T SEE HOW THAT COULD POSSIBLY
17 SURVIVE DAUBERT. I DON'T SEE HOW YOU COULD POSSIBLY HAVE AN
18 EXPERT MAKE A PREDICTION ABOUT ANYTHING ABOUT THE FDA ON THE
19 BASIS OF THREE DOCUMENTS.

20 THAT IS NOT HOW ANY OF THEIR CONSULTANTS WOULD WORK.
21 IT IS NOT WHAT ANYONE ATTEMPTING TO ADDRESS THE FDA WOULD
22 ACTUALLY DO.

23 SO FOR OUR CASE, HE LOOKED THROUGH THE MATERIALS
24 AVAILABLE FOR THEM. AND AGAIN, THE IDEA THAT WELL, INSTEAD, WE
25 ARE SUPPOSED TO HAVE AN IPSE DIXIT ASSERTION ABOUT WHAT THEY

1 READ THE EGAN ARTICLE TO MEAN. THAT IS NOT PREEMPTION. THAT
2 HAS NEVER BEEN OUR PREEMPTION WORK.

3 IN FACT, YOUR HONOR DENIED THE SAME ARGUMENT TO THE
4 ONGLYZA DEFENDANTS. THEY SAID IT'S A MOTION TO DISMISS. YOU
5 DON'T NEED TO GET INTO THE FACTS. IT WAS DENIED. WE WENT INTO
6 DISCOVERY. WE WENT INTO DISCOVERY HERE. WE ARE IN THE FACTS.

7 SO I DON'T THINK THAT IS AN APPROPRIATE STANDARD. I
8 DON'T THINK IT'S AN APPROPRIATE REMEDY. THE REMEDY WOULD BE
9 CROSSING OUT ALL THE FACTS OF PREEMPTION. THEN HOW DO THEY
10 EVEN GET THE PREEMPTION THEMSELVES?

11 WHICH MOVES TO WHAT IT IS THAT HE HAS. AND I NOTICED
12 THAT MR. BOEHM'S ARGUMENT FOCUSED ON WE LOST THE OPPORTUNITY TO
13 OBJECT. WE SHOULD HAVE HAD THE OPPORTUNITY TO OBJECT. NOW,
14 OUR VIEW IS HE DOESN'T FALL WITHIN THE DEFINITION.

15 BUT LET'S ASSUME THEY HAD THE OPPORTUNITY TO OBJECT.
16 THEN WHAT? WHAT WOULD THEY SAY WAS INAPPROPRIATE OR COULD NOT
17 BE GIVEN TO THE EXPERT? BECAUSE BEAR IN MIND THIS IS A
18 MULTIPLE-DEFENDANT LITIGATION. THEY HAVE GIVEN US THOUSANDS OF
19 REDACTIONS. THEY HAVE REFUSED TO PROVIDE US MILLIONS OF
20 DOCUMENTS. EVERYTHING WE EVER LOOK AT HAS SOMEWHERE ON IT A
21 REDACTION. AND WHY? BECAUSE AT LEAST THEY CONTEND WHY: THOSE
22 REDACTIONS RELATE TO THE ACTUAL TRADE SECRETS. THE FACT THAT
23 YOU HAD A CERTAIN NUMBER OF PANCREATIC CANCER INCIDENTS IN YOUR
24 TRIAL IS NOT A TRADE SECRET. IT DOES NOT HELP A COMPETITOR DO
25 ANYTHING. IT DOES NOT AID THEIR MANUFACTURING. IT DOES NOT

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1 HELP THEM WITH PRICING. IT'S SIMPLE SAFETY DATA ABOUT HOW THE
2 DRUG HAS WORKED IN THE ENVIRONMENT.

3 SO AGAIN, THEY CAN'T SHOW ANY OF THIS WAS IMPROPER TO
4 GIVE TO THE EXPERTS BECAUSE THE TRUE CONFIDENTIALITY HERE, THE
5 TRADE SECRETS, HAVE ALREADY BEEN PRESERVED BEFORE ANYTHING EVER
6 MADE IT TO US. WE DON'T KNOW PRICING DATA ON JANUVIA. WE
7 DON'T KNOW HOW YOU MAKE BYETTA. WE HAVEN'T SOUGHT IT. WE
8 HAVEN'T SOUGHT TO REMOVE THE REDACTIONS THEY CLAIM ARE RELATED
9 TO IT. WE HAVE STUCK WITH THE PARTS THAT ARE NOT TRULY
10 CONFIDENTIAL. THE PARTS THAT DO NOT AID ANY COMPETITOR WOULD
11 NOT AID US. AND WE HAVE ABIDED BY THAT.

12 SO I THINK IF YOUR HONOR IS GETTING TO THE ISSUE OF
13 WHAT ARE ALTERNATIVE SANCTIONS, WHAT IS THE PREJUDICE HERE, THE
14 DEFENDANTS HAVEN'T EVEN ARGUED ONE. THE PREJUDICE THEY ARGUE
15 IS WE LOST THE OPPORTUNITY TO OBJECT. WELL, THAT IS NOT WHAT
16 YOU BASE A SANCTION ON. THAT IS NOT WHAT YOU BASE ANYTHING ON.
17 YOU BASE IT ON HARM. SO WHAT WOULD THE HARM HAVE BEEN?

18 IF WE HAD GIVEN THEM NOTICE IN ADVANCE, WHAT WOULD
19 THEY HAVE DONE? THEY WOULD HAVE SAID, "WELL, YOU CAN'T PROVIDE
20 TO HIM THE UNDERLYING DATA OF THE ANGLE META-ANALYSIS." I
21 DON'T THINK YOUR HONOR WOULD HAVE SAID THAT WAS APPROPRIATE.

22 "YOU CAN'T PROVIDE TO THEM THE DEPOSITION OF OUR
23 EPIDEMIOLOGIST." I DON'T THINK YOUR HONOR WOULD HAVE SAID THAT
24 THAT WAS AN APPROPRIATE OBJECTION.

25 WHAT HE REVIEWED AND WHAT HE CITES IN HIS REPORT, ALL

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1 OF IT, IS RELATING TO A CBE. IT'S RELATING TO PREEMPTION. IT
2 HAS NOTHING TO DO THAT WOULD AID EXSULIN. IT HAS NOTHING TO DO
3 TO AID ANY OF THE DEFENDANTS HERE WITH ONE ANOTHER.

4 AND I SAID THIS PREVIOUSLY, BUT I DO THINK IT NEEDS
5 TO BE REITERATED. HIS REPORT IS NOT A GENERAL CAUSATION
6 REPORT. HE IS NOT AN EXPERT IN EVERY ONE OF THOSE FIELDS. HE
7 IS AN EXPERT ON THE FDA. EVERY WORD IN THAT, EVERY SENTENCE IN
8 THAT IS THERE TO SHOW WHAT THE FDA WOULD DO IN RESPONSE TO A
9 CBE. DOES IT GET HEAVILY INTO THE SCIENCE? IT DOES. IT HAS
10 TO.

11 THE DEFENDANT CANNOT SAY THE FDA WOULD HAVE REJECTED
12 A BAD CBE I SENT IT. IF I SENT A ONE-LINE "I WANT TO CHANGE
13 THIS," AND THE FDA REJECTED IT, THEY HAVE PROVEN NOTHING. WHAT
14 THEY HAVE TO PROVE IS WHAT THEY WOULD HAVE ACTUALLY SHOWN THE
15 FDA IN A GENUINE CBE.

16 WELL, THEY WOULD NEED TO SHOW THE EVIDENCE THEY HAVE
17 WITH IT. THEY WOULD NEED TO SHOW HEALTH CANADA. THEY WOULD
18 NEED TO SHOW THE IMBALANCE OF PANCREATIC CANCER UNDER TRIALS.
19 THIS IS THE SAME EVIDENCE THAT DR. FLEMING HAD IN HIS OWN
20 POSSESSION.

21 SO GETTING TO THE PREJUDICE THAT I HEARD SPECIFIED.
22 ONE WAS LOST OPPORTUNITY. ANOTHER ONE WAS, I THINK, THE
23 DIFFICULTY OF CROSS-EXAMINING HIM.

24 AND TO BE CANDID, I DON'T QUITE UNDERSTAND THAT.
25 BECAUSE HE REFERENCES MATERIALS THAT WERE AVAILABLE TO HIM, BUT

1 HIS REPORT, IN IT, SAYS WHAT SPECIFIC DOCUMENT HE IS LOOKING AT
2 AND WHERE HE IS RELYING ON IT. SO THERE IS NO PREJUDICE OFF OF
3 THAT. THAT SUM TOTAL, I THINK, IS PROBABLY SOME 40 OR 50
4 DOCUMENTS THAT HE HAS CITED IN THE CONTEXT OF HIS REPORT. THEY
5 CAN USE THOSE DOCUMENTS IN CROSS-EXAMINING HIM. I DON'T KNOW
6 WHY THEY FEEL THAT'S IMPOSSIBLE, THAT'S DIFFICULT. THAT'S
7 STANDARD CROSS-EXAMINATION.

8 AND I THINK THERE WAS A REFERENCE TO THEY MIGHT HAVE
9 TO DISCLOSE OTHER INFORMATION TO HIM IN ORDER TO CROSS-EXAMINE
10 HIM. I CAN'T ENVISION HOW THAT WOULD HAPPEN. EVERYTHING HE
11 REFERENCES IN THERE IS PART OF THE OVERALL DISCOVERY. IF THEY
12 HAVE A DOCUMENT THAT WAS NOT PRODUCED IN DISCOVERY TO US, WELL,
13 YEAH, I THINK THEY WOULD HAVE DIFFICULTY CROSS-EXAMINING HIM ON
14 THAT BECAUSE IT WOULD BE, IN ESSENCE, ADMITTING A DISCOVERY
15 VIOLATION.

16 SO, AGAIN, THIS COMES BACK TO IF YOUR HONOR DOES FIND
17 A VIOLATION AND IS LOOKING FOR WHAT IS THE SANCTION OFF OF
18 THIS, WELL, WHAT'S THE HARM TO THEM OFF OF THIS? A LOST
19 OPPORTUNITY IS NOT A HARM. AN IDEA THAT I CAN'T CROSS-EXAMINE
20 HIM ON MY OWN DOCUMENTS THAT HE DIDN'T REFERENCE IN HIS REPORT,
21 THAT'S NOT A HARM, EITHER.

22 AND THIS IDEA ABOUT THE PROTECTIVE ORDER BEING A
23 PAPER TIGER. IT IS NOT A PAPER TIGER. THEY THEMSELVES PUT IN
24 A LOT OF EFFORT TO IT TO KEEP OUT TRADE SECRETS, TO KEEP OUT
25 INFORMATION THEY DIDN'T WANT EACH OTHER TO HAVE. WE DIDN'T

1 FIGHT THEM ON THAT. WE LET THEM HAVE NUMEROUS REDACTIONS.

2 MIGHT THERE BE RELEVANT INFORMATION UNDERLYING THEM?
3 PERHAPS SO. WE WEREN'T GOING TO BRING THE COURT IN ON THAT.
4 WE WEREN'T GOING TO HAVE A FIGHT OVER IT. WE DON'T WANT TRADE
5 SECRET INFORMATION. WE DON'T WANT PRICING DATA. WE DON'T WANT
6 MANUFACTURING DATA. WE HONORED IT.

7 AND, YOUR HONOR, I DO THINK THERE IS AN IMPORTANT
8 CODA ON THIS. WE FILED HIS REPORT ENTIRELY UNDER SEAL. THE
9 DEFENDANTS THEMSELVES PUT A COPY OF HIS REPORT ON THE DOCKET.
10 I'M NOT SURE WHY. PARTIALLY REDACTED, BUT STILL HAD THE
11 ESSENCE OF HIS CONCLUSIONS THERE, AVAILABLE FOR THE WHOLE WORLD
12 TO SEE. NOT ONE ARTICLE IN IT. NOT ONE PRESS REPORT.
13 NOTHING. YOUR HONOR STRIKES IT FROM THE DOCKET.

14 THEN WE COME TO THIS MOTION. THEY ACCUSE DR. FLEMING
15 PUBLICALLY, ON THE DOCKET, OF BREACHING HIS CONFIDENTIALITY
16 AGREEMENT. AND YOU CAN SEE HERE THEY STILL CAN'T POINT TO
17 ANYTHING SPECIFICALLY DOING IT. WE JUST HAD AN ARGUMENT OVER
18 THE SUNSET PROVISIONS. THEY STILL CAN'T POINT TO ANYTHING
19 SHOWING IT, BUT THEY PUT THAT ON THE PUBLIC DOCKET. THE PART
20 WE'RE TALKING ABOUT HERE, THE SEPARATE MOTION, THE WHOLE THING
21 WAS ON THE PUBLIC DOCKET. WITHIN THREE DAYS OF THAT GOING ON
22 THERE, THERE IS A *LAW360* STORY, BLASTING DR. FLEMING, QUOTING
23 FROM THEIR BRIEFS.

24 SO IF WE ARE TALKING HERE OF WHO HAS A GENUINE
25 CONCERN FOR CONFIDENTIALITY, WHO IS GENERALLY FOLLOWING THESE

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1 PROTECTIVE ORDERS, I WOULD SUBMIT TO YOU THE PLAINTIFFS ARE,
2 THE DEFENDANTS ARE NOT.

3 **THE COURT:** OKAY. WELL, THANK YOU.

4 DID YOU WANT TO SAY ANYTHING, MR. BOEHM, IN RESPONSE?

5 **MR. BOEHM:** IF I MAY.

6 **THE COURT:** YOU MAY.

7 **MR. BOEHM:** YOUR HONOR, SOME OF THE ARGUMENTS THAT
8 WE'VE JUST HEARD FROM MR. KENNERLY WOULD HAVE BEEN INTERESTING
9 TO HAVE HEARD DURING THE 14-DAY PERIOD DURING WHICH WE SHOULD
10 HAVE BEEN ABLE TO ADDRESS ARGUMENTS PURSUANT TO THE TERMS OF
11 THE PROTECTIVE ORDER. UNFORTUNATELY, WE DID NOT HAVE THAT
12 OPPORTUNITY.

13 THE PROTECTIVE ORDER OUGHT TO BE HONORED. WE DIDN'T
14 HAVE A CHANCE TO DEFEND OUR RIGHTS UNDER THE PROTECTIVE ORDER.

15 AND WITH RESPECT TO WHETHER OR NOT THIS COURT WOULD
16 HAVE MAINTAINED OUR CONFIDENTIALITY DESIGNATIONS, LET ME JUST
17 POINT OUT ONE VERY IMPORTANT FACT.

18 MANY OF THE DOCUMENTS THAT ARE CITED IN DR. FLEMING'S
19 REPORT OR ARE INCLUDED IN HIS LIST OF RELIANT MATERIALS HAVE
20 ALREADY BEEN THE SUBJECT OF MOTIONS TO SEAL, MOTIONS THAT HAVE
21 BEEN GRANTED. THESE DOCUMENTS HAVE ALREADY BEEN UPHELD AS
22 CONFIDENTIAL BY COURT ORDER.

23 I'M GLAD WE HAD THE OPPORTUNITY TO CLARIFY THAT WE
24 ARE REALLY TALKING ABOUT TWO DIFFERENT MOTIONS. I BELIEVE THAT
25 MR. KENNERLY TALKED AS IF THE CONCERN, THE PREJUDICE FOR US IS

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1 THAT SOMEHOW DR. FLEMING HAD DOCUMENTS ALREADY THAT WE THEN
2 WERE GOING TO BE FORCED TO CROSS-EXAMINE HIM ABOUT. THAT'S NOT
3 THE PREJUDICE.

4 THE PREJUDICE IS THAT HE IS A COMPETITOR. AND WITH
5 RESPECT TO THIS MOTION WAS GIVEN DOCUMENTS THAT HE OTHERWISE
6 NEVER WOULD HAVE HAD. IN SOME CASES THESE DOCUMENTS INCLUDE
7 SENSITIVE CLINICAL AND PRECLINICAL STUDY DESIGNS AND PROTOCOLS,
8 REGULATORY CORRESPONDENCE THAT HAS BEEN MARKED "ATTORNEYS' EYES
9 ONLY," WHICH MEANS THAT I CAN'T EVEN SHOW IT TO MY OWN CLIENT
10 IF IT COMES FROM ANOTHER COMPANY.

11 HE IS A COMPETITOR; THAT'S THE POINT. THAT IS WHAT
12 MAKES IT DIFFICULT TO CROSS-EXAMINE HIM IN A DEPOSITION. WE
13 HAVE TO USE OUR CONFIDENTIAL DOCUMENTS TO BE ABLE TO DO THAT
14 ROBUSTLY AND EFFECTIVELY. AND THAT IS NOT SOMETHING WE WANT TO
15 DO OR SHOULD BE FORCED TO HAVE TO DO. AND WE WOULDN'T HAVE
16 BEEN IF WE HAD AN OPPORTUNITY TO OBJECT, AS WE SHOULD HAVE
17 BEEN.

18 **THE COURT:** OKAY. WELL, THANK YOU. I WILL TAKE THE
19 TWO MOTIONS UNDER SUBMISSION. I WANT TO GO BACK AND RECONSIDER
20 OR CONSIDER, AGAIN, ALL THE PRECISE POINTS THAT HAVE BEEN MADE
21 AND PUT INTO CONTEXT THE ANSWERS TO THE QUESTIONS YOU FOLKS
22 WERE KIND ENOUGH TO GIVE.

23 I WISH I COULD DISTILL IT DOWN AND RESOLVE IT THIS
24 AFTERNOON, BUT THAT IS JUST NOT GOING TO BE FAIR OR BEST
25 PRACTICE FOR ANYBODY. SO THOSE MATTERS ARE SUBMITTED.

1 AND I KNOW WE ALSO HAVE STATUS ASSOCIATED WITH A CASE
2 ON THE BURNER TODAY. AND LOOKING AT THE JOINT REPORT THAT WAS
3 SUBMITTED, THE FIRST OF WHICH WOULD BE THE STATUS OF
4 PREEMPTION, GENERAL CAUSATION EXPERTS' SCHEDULE, WHO WANTS TO
5 TELL ME ABOUT WHERE WE ARE, WHAT THAT MEANS, AND WHERE WE NEED
6 TO GO?

7 IT SOUNDS LIKE A LOT OF WHAT HAPPENS NEXT WILL DEPEND
8 ON WHETHER OR NOT FLEMING IS DISQUALIFIED IN WHOLE OR IN PART
9 OR IN SOME OTHER WAY.

10 AND SO FROM THE PLAINTIFFS' STANDPOINT,
11 MR. SHKOLNIK -- YOU'RE ABOUT TO STAND -- GO AHEAD AND TELL ME
12 WHAT YOU THINK WE SHOULD ADDRESS NEXT.

13 **MR. SHKOLNIK:** WELL, YOUR HONOR, MAYBE I'M NOT CLEAR
14 ON WHAT THE NEXT STEP WOULD BE. BUT CERTAINLY THE COURT'S
15 DECISION ON THE DISQUALIFICATION IS GOING TO AFFECT US AS IT
16 RELATES TO A REGULATORY EXPERT AND AN ENDOCRINOLOGY EXPERT. I
17 THINK IT'S FAIR TO SAY THAT WE ARE ON TRACK FOR EXCHANGE OF
18 GENERAL CAUSATION EXPERTS, AS HAS BEEN ORDERED BY THE COURT.

19 THERE ARE A COUPLE OF ITEMS THAT WE'RE STILL WORKING
20 WITH THE DEFENDANTS ON IN TERMS OF SOME DATA, BUT THAT IS NOT
21 AFFECTING THE EXPERT REPORTS AND THE SCHEDULE DATE.

22 SOME OF THESE MATTERS MAY BE NECESSARY FOR EITHER
23 REBUTTALS, REPLY EXPERT REPORTS, OR POSSIBLY SUPPLEMENTS LATER
24 ON DOWN THE ROAD, BUT NOTHING, AS WE SEE IT NOW, IS GOING TO
25 AFFECT EXPERT REPORTS THAT ARE PLANNED FOR THE 17TH, I THINK IT

1 IS. IS MY DATE RIGHT? 19TH. I DIDN'T HAVE MY NOTES IN FRONT
2 OF ME. SO AS TO THE EXPERT REPORTS, WE ARE FINE.

3 AS TO DR. FLEMING, THAT IS A BIG ISSUE THAT IS
4 HANGING OVER US.

5 **THE COURT:** AND I APPRECIATE THAT.

6 **MR. SHKOLNIK:** AS REQUESTED BY THE DEFENDANT, ALL
7 DEFENDANTS, IN DECEMBER -- AND I DON'T KNOW WHICH DATE -- WE
8 IMMEDIATELY STOPPED INTERACTING WITH DR. FLEMING IN THE AREA OF
9 THE GENERAL CAUSATION. WE STOPPED PROVIDING ANY ADDITIONAL
10 INFORMATION OR GOING OVER ANY INFORMATION, AND SECURED THE
11 INFORMATION THAT HAD PREVIOUSLY BEEN PROVIDED TO HIM.

12 SO WE ARE CERTAINLY BEHIND THE EIGHT BALL BY AT LEAST
13 60 TO 75 DAYS WITH HIS OPINIONS IN THAT AREA, IN THE AREAS OF
14 ENDOCRINOLOGY AND GENERAL CAUSATION. SO ONCE WE SEE WHAT THE
15 COURT IS GOING TO DO, WE ARE DEFINITELY GOING TO NEED
16 ADDITIONAL TIME AS TO THAT EXPERT. AND I THINK I MAKE THAT
17 REPRESENTATION AT THIS TIME.

18 **THE COURT:** I APPRECIATE THAT. I HAVEN'T HEARD FROM
19 THE DEFENSE, OF COURSE, BUT I WONDER IF IT WOULDN'T BE BETTER
20 TO SET THIS ISSUE OF STATUS OFF SEVERAL WEEKS, AND IN THE
21 INTERIM MY DECISION WOULD ISSUE. IT WOULD GIVE YOU A CHANCE TO
22 PUT THAT INTO THE CALCULUS OF THE ISSUE OF WHERE WE GO NEXT,
23 AND THEN WE COULD HAVE MAYBE A MORE MEANINGFUL DISCUSSION, AS A
24 THOUGHT.

25 **MR. SHKOLNIK:** I THINK THAT IS A VERY GOOD IDEA, YOUR

1 HONOR. I THINK WE ALL WOULD BENEFIT BY THE GUIDANCE OF YOUR
2 OPINION AND THEN A STATUS.

3 **THE COURT:** BECAUSE THEN YOU WOULD KNOW WHICH WAY
4 YOU'RE GOING.

5 MR. MARVIN, DID YOU HAVE A COMMENT IN THAT REGARD, OR
6 THOUGHTS, SIR?

7 **MR. MARVIN:** YOUR HONOR, DOUGLAS MARVIN REPRESENTING
8 MERCK. I THINK I CAN SPEAK ON BEHALF OF THE OTHER DEFENDANTS,
9 ALTHOUGH THEY CAN GET UP AND LET ME KNOW IF I'M NOT.

10 IT APPEARS AS THOUGH EVERYONE IS GOING IN THE SAME
11 DIRECTION. WE ALL RECOGNIZE THAT A RULING ON THE FLEMING
12 MOTIONS CAN HAVE SOME BEARING ON THE SCHEDULE. SO IN LIGHT OF
13 WHAT YOUR HONOR JUST MENTIONED ABOUT RECONVENING, ONCE WE HAVE
14 THOSE RULINGS PERHAPS WE CAN -- ONCE WE GET THE RULINGS,
15 DISCUSS IT WITH THE PLAINTIFFS AND COME UP WITH AN AGREED
16 SCHEDULE THAT WE WOULD PROPOSE TO YOUR HONOR. BUT IF NOT, WE
17 WOULD COME BACK TO YOUR HONOR WITH BOTH PARTIES' THOUGHTS ON
18 THAT SCHEDULE.

19 **THE COURT:** OKAY. WOULD IT BEHOOVE US, DO YOU THINK,
20 SIR -- AND IF ANYBODY ELSE DIFFERS FROM MR. MARVIN'S COMMENTS,
21 CERTAINLY SAY SO -- TO SET THINGS OUT MAYBE THREE WEEKS FOR A
22 SCHEDULING CONFERENCE? DOES THAT SEEM TOO SHORT, TOO LONG? I
23 DON'T KNOW HOW LONG, FRANKLY, IT WILL TAKE ME TO DECIDE AND
24 AUTHOR THE DECISION THAT WILL GIVE YOU THE GUIDANCE THAT YOU
25 NEED. BUT I'M THINKING THREE, FOUR WEEKS -- THAT MAY BE THE

1 MAXIMUM FOR A STATUS -- WOULD BE PRUDENT. IT PUTS SOME
2 PRESSURE ON ME, BUT I DON'T WANT TO PUT UNDUE PRESSURE ON YOU
3 FOLKS IN THE WAKE OF WHAT I MIGHT DO TO YOU OR FOR YOU.

4 **MR. SHKOLNIK:** YOUR HONOR, FROM THE PLAINTIFFS'
5 STANDPOINT, THREE, FOUR WEEKS WOULD BE FINE. IT GIVES YOU
6 ENOUGH TIME TO WRITE WHATEVER OPINION YOU HAVE TO, AND IT GIVES
7 US TIME TO WORK TOGETHER TO COME UP WITH A PROPOSAL. AND IF WE
8 CAN'T, THEN TO COME TO THE COURT AND ASK THE COURT TO SET IT.

9 **THE COURT:** OKAY. MR. MARVIN AND FELLOW DEFENDANTS?

10 **MR. MARVIN:** I THINK THAT IS FINE, YOUR HONOR, IF WE
11 JUST MOVE THINGS BACK THREE WEEKS OR SO.

12 AND AS I SAY, ONCE WE GET THE RULING, HOPEFULLY WE
13 CAN ALL COME TO AN AGREEMENT WITHIN A WEEK OR SO. BUT
14 CERTAINLY WITHIN TWO WEEKS AFTER THAT I WOULD HOPE THAT WE
15 COULD HAVE IT RESOLVED.

16 **THE COURT:** OKAY. EVERYONE ELSE CONCUR ON THE
17 DEFENSE SIDE, THE LADIES AND GENTLEMEN?

18 WHY DON'T WE, OUT OF AN ABUNDANCE OF CAUTION, SAY
19 APRIL 2ND. IT WILL GIVE ME FOUR WEEKS. AND IF IT TAKES A
20 COUPLE WEEKS TO ADJUST US TO THE WRITTEN WORK PRODUCT THAT I
21 ISSUE, THAT GIVES YOU A COUPLE WEEKS TO RALLY THE TROOPS AND
22 DECIDE.

23 I WOULDN'T WORRY SO MUCH ABOUT HAVING AN ADVANCE
24 SUBMISSION TO ME. WE CAN JUST TALK ABOUT IT WHEN WE GET HERE.
25 AND IT CAN BE TELEPHONIC FOR ALL CONCERNED OR FOR THOSE THAT

1 PREFER TO SAVE WEAR AND TEAR. BUT WOULD SOMETHING LIKE
2 APRIL 2ND AT 2:00 WORK? THAT IS ANOTHER THURSDAY.

3 **MR. SHKOLNIK:** THAT WOULD BE FINE, YOUR HONOR.

4 **THE COURT:** JUDGE HIGHBERGER, ARE YOU STILL WITH US,
5 SIR?

6 **JUDGE HIGHBERGER:** YES. APRIL 2ND WOULD WORK IN THE
7 AFTERNOON. YOU ARE GOING TO LOSE ME NOW, BUT I TRUST MY LAW
8 CLERK MATTHEW LAHANA IS ON THE LINE. HE SHOULD HAVE ACCESS TO
9 MY CALENDAR, EVEN AS I DEPART. BUT APRIL 2ND IN THE AFTERNOON
10 WOULD BE FINE.

11 **THE COURT:** GIVEN YOUR TIME IS SHORT, SIR, IS THERE
12 ANYTHING ELSE YOU WOULD LIKE TO REPORT BY WAY OF STATUS OR
13 COMMENT WITH REGARD TO THE JCCP AS IT RELATES TO OUR CASE IN
14 THE FEDERAL COURT?

15 **JUDGE HIGHBERGER:** NO. NO, I DON'T THINK SO. I'M
16 GLAD YOU HAVE TO DECIDE THE TWO MOTIONS IN FRONT OF YOU AND NOT
17 ME.

18 **THE COURT:** I'M GLAD FOR YOU, TOO. WELL, THANK YOU.
19 FEEL FREE TO DROP OFF WHEN YOU NEED TO.

20 WE'LL TALK NOW ABOUT THE THYROID CASES THAT ARE
21 CONSOLIDATED HERE, UNLESS THERE IS SOMETHING ELSE ANYONE WANTS
22 TO RAISE ON THE MDL, THE PANCREATIC CANCER SIDE? SEEING NOBODY
23 MAKE A MOVE.

24 WHAT ABOUT THE THYROID CASES? HOW ARE WE DOING
25 THERE? WHO WOULD LIKE TO TAKE THAT UP?

1 **MR. THOMPSON:** YOUR HONOR, THIS IS RYAN THOMPSON.
2 CAN YOU HEAR ME IN THE COURT?

3 **THE COURT:** I CAN.

4 **MR. THOMPSON:** OKAY. I HAD ONE ISSUE THAT I WANTED
5 TO PREVIEW FOR THE COURT AS IT RELATES TO THE MDL PANCREATIC
6 CANCER CASES.

7 **THE COURT:** OKAY.

8 **MR. THOMPSON:** AND AT THIS TIME IT'S MORE OF A
9 PREVIEW OF AN UPCOMING POTENTIAL ISSUE THAT I WANTED TO APPRIZE
10 YOUR HONOR ON AND GIVE YOU A LITTLE BIT OF BACKGROUND AS TO
11 WHERE WE ARE, IN THE EVENT THAT THIS COMES TO THE COURT IN THE
12 FUTURE.

13 THERE WAS RECENTLY A PUBLICATION DONE THAT WAS OUT OF
14 THE UNIVERSITY OF TEXAS. SOME OF THE AUTHORS OF THAT WERE
15 DR. FOLLI, DR. DEFRONZO AND OTHERS. THE TITLE OF THAT
16 PUBLICATION WAS *CHRONIC CONTINUOUS EXENATIDE INFUSION DOES NOT*
17 *CAUSE PANCREATIC INFLAMMATION AND DUCTAL HYPERPLASIA IN*
18 *NON-HUMAN PRIMATES.*

19 AND WHAT THAT STUDY WAS IS IT LOOKED AT 52 BABOONS
20 THAT HAD BEEN INFUSED WITH EXENATIDE AND LOOKED AT THEIR
21 PANCREATA AFTER INFUSION OF EXENATIDE. AND ONE OF THE THINGS
22 THAT WE THINK WOULD BE USEFUL TO THE COURT, AND THAT WE HAVE
23 BEEN TRYING TO OBTAIN, IS WHETHER OR NOT THE PANCREATA FROM
24 THOSE BABOONS SHOWED SIGNS OF PROLIFERATION.

25 THERE WERE A NUMBER OF SLIDES TAKEN FROM THOSE

1 ANIMALS DURING THE STUDY, BOTH BEFORE AND AFTER THE INFUSION.
2 ONE OF THOSE SETS OF SLIDES WAS MARKED WITH A STAIN THAT IS
3 KNOWN AS KI-67 OR MIB-1. AND WHAT THAT IS DESIGNED TO SHOW IN
4 THE PANCREAS IS WHETHER THERE ARE PROLIFERATION MARKERS OR
5 PROLIFERATION IS ACTUALLY OCCURRING THEN. AND SO WHAT THAT
6 WOULD ALLOW US TO DO IS SEE WHETHER OR NOT INFUSION WITH
7 EXENATIDE DOES ACTUALLY SHOW SIGNS OF PROLIFERATION THERE.

8 WHEN WE FOUND OUT ABOUT THIS PUBLICATION AND THE
9 STUDY THAT WAS GOING ON -- IT'S ONE THAT WAS FUNDED BY THE NIH
10 AND ALSO BY ELI LILLY AND AMYLIN -- WE SUBPOENAED THE
11 UNIVERSITY OF TEXAS AND DR. FOLLI IN AUGUST OF 2014.

12 WE SUBSEQUENTLY, AFTER THAT, ALSO SERVED A SUBPOENA
13 ON DR. DEFRONZO. DR. FOLLI AND DR. DEFRONZO WERE TWO OF THE
14 LEAD AUTHORS ON THAT STUDY. WE SUBSEQUENTLY LEARNED, AFTER
15 THAT, THAT DR. FOLLI WAS IN BRAZIL, ON SABBATICAL OUT OF THE
16 COUNTRY, FOR A YEAR. SO WE COULD NOT GET HIM FOR A DEPOSITION,
17 BUT WHAT HE DID DO IS PROVIDE US WITH A SMALL DOCUMENT
18 PRODUCTION RELATED TO THAT STUDY.

19 WHEN WE GOT THAT, WE DISCOVERED THAT ANOTHER COMPANY
20 IN TEXAS HAD SLIDES FROM THAT STUDY. AND WE WANTED TO HAVE THE
21 OPPORTUNITY TO OBTAIN, REVIEW AND SCAN THOSE SLIDES.

22 IN OCTOBER OF 2014, WE SERVED A SUBPOENA ON A COMPANY
23 IN SAN ANTONIO CALLED "SOUTHWEST RESEARCH INSTITUTE." WE LATER
24 FOUND OUT, AFTER GETTING ADDITIONAL DOCUMENT PRODUCTION AND
25 TALKING WITH SOUTHWEST RESEARCH INSTITUTE, THAT THE COMPANY

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1 THAT ACTUALLY HAD THEM WAS A COMPANY CALLED "TEXAS BIOMEDICAL
2 RESEARCH INSTITUTE."

3 WE SERVED A SUBPOENA ON THEM IN NOVEMBER OF 2015
4 (SIC) AND WERE ABLE TO GET A FAIRLY ROBUST DOCUMENT PRODUCTION
5 FROM TEXAS BIOMED. AND THEN IN DECEMBER BEGAN MAKING
6 ARRANGEMENTS FOR US TO BRING IN STAINING EQUIPMENT FROM
7 CALIFORNIA AND CONSULTANTS FROM AROUND THE WORLD TO COME IN AND
8 SCAN THOSE SLIDES.

9 IN JANUARY OF 2015, WE BEGAN THE PROCESS AT TEXAS
10 BIOMED OF SCANNING THOSE SLIDES. WE QUICKLY DISCOVERED DURING
11 THAT PROCESS -- WE HAD APPROXIMATELY 200 SLIDES THAT WE WERE
12 ABLE TO SCAN, BUT THE SLIDES THAT WE WERE MOST INTERESTED IN,
13 THE ONES THAT WOULD SHOW PROLIFERATION IN THE PANCREAS, THE
14 KI-67 OR THE MIB-1 SLIDES, WERE NOT THERE.

15 WE WENT TO U.T., WHO IS REPRESENTED BY THE TEXAS
16 ATTORNEY GENERAL. WE WENT TO TEXAS BIOMED, TRYING TO FIGURE
17 OUT WHERE THESE SLIDES WERE. SINCE WE HAD THE EQUIPMENT THERE,
18 WE OBVIOUSLY WANTED TO BE ABLE TO SEE THOSE SLIDES BECAUSE THEY
19 WOULD BE THE ONES THAT WOULD BE THE MOST INFORMATIVE TO US, AND
20 WE BELIEVE TO THE COURT, IN LOOKING AT WHAT EXENATIDE DOES IN
21 THE PANCREAS, ESPECIALLY WHEN WE CAN SEE WHETHER OR NOT
22 PROLIFERATION IS OCCURRING.

23 WHAT WE DISCOVERED ON FEBRUARY 5TH IS THAT THOSE
24 SLIDES, OUT OF ALL THE SLIDES, HAD LEFT THE COUNTRY. NOW,
25 THERE IS SOME CONFUSION AS TO WHETHER OR NOT THEY WERE ACTUALLY

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1 EVER IN THE COUNTRY. TEXAS BIOMED HAS SAID THAT THEY WERE;
2 OTHERS HAVE SAID THAT THEY WERE NOT.

3 BUT AT THE END OF THE STORY, IRRESPECTIVE OF WHO IS
4 RIGHT, WHAT WE UNDERSTAND NOW IS THAT THOSE SLIDES ARE IN ITALY
5 WITH ONE OF THE OTHER STUDY AUTHORS, A DOCTOR BY THE NAME OF
6 DR. LA ROSA.

7 I HAVE TRIED E-MAIL CORRESPONDENCE WITH DR. LA ROSA
8 AND OTHERS. WE HAVE SENT ADDITIONAL SUBPOENAS TO U.T. TO TRY
9 AND FIGURE OUT WHERE THESE SLIDES ARE, IF THEY ARE ALL ACTUALLY
10 IN ITALY AND WHEN THEY LEFT THE UNITED STATES, SO THAT WE CAN
11 FINISH THIS PROJECT AND OBTAIN THAT INFORMATION.

12 I HAVE ALSO RECENTLY REACHED OUT TO THE DEFENDANTS IN
13 THIS CASE, COUNSEL FOR AMYLIN AND ELI LILY, TO SEE WHETHER OR
14 NOT THEY HAD CONTROL OVER THOSE SLIDES, AS WELL. AND I WILL
15 MAKE AND TAKE NO POSITION ON WHETHER OR NOT THEY DO AT THIS
16 TIME, BUT I DID WANT TO UPDATE THE COURT THAT COUNSEL FOR
17 AMYLIN HAS RECENTLY OFFERED TO CONFER WITH US ON WHETHER OR NOT
18 THEY WOULD BE ABLE TO ASSIST IN FACILITATING THE REVIEW OF
19 THOSE SLIDES IN ITALY.

20 THAT IS AN OFFER. I SENT THEM AN E-MAIL TODAY,
21 THANKING THEM FOR THAT. WE BELIEVE AS ONE OF THE COMPANIES
22 THAT FUNDED THAT STUDY, THAT A REQUEST FROM THEM TO ALLOW US TO
23 SCAN AND REVIEW THOSE SLIDES IN ITALY WOULD GO A LONG WAY. AND
24 WE INTEND TO HAVE CONVERSATIONS WITH THEM IN THAT REGARD IN THE
25 NEAR FUTURE.

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1 BUT I WANTED TO APPRIZE THE COURT OF THE FACT THAT WE
2 DO HAVE MULTIPLE SUBPOENAS OUT. AND WE ARE TRYING TO FIND
3 THESE SLIDES THAT WE THINK ARE VERY IMPORTANT TO US TO BE ABLE
4 TO REVIEW.

5 AND THERE IS NOT AN ISSUE THAT IS RIPE FOR THE COURT
6 TODAY, BUT I WANTED TO GIVE YOU SOME BACKGROUND ON WHAT HAS
7 GONE ON OVER THE LAST HALF-YEAR-PLUS, AND HOW CLOSE WE ARE TO
8 BEING ABLE TO GET THOSE.

9 I DO NOT AND AM NOT REQUESTING THAT WE HAVE ANY KIND
10 OF AN EXTENSION ON OUR EXPERT REPORTS, BUT IT COULD BE THAT
11 AFTER OUR REPORTS ARE IN, THAT INFORMATION COMES. AND IF IT
12 DOES, I DO BELIEVE THAT WE WOULD HAVE AN OBLIGATION TO
13 SUPPLEMENT.

14 BUT MORE THAN ANYTHING, THERE COULD BE SUBPOENAS THAT
15 WE HAVE OUTSTANDING THAT COULD REQUIRE THE COURT'S INTERVENTION
16 IN THE NEAR FUTURE. AND AS A RESULT, I WANTED TO GIVE YOU A
17 LITTLE BIT OF A BACKGROUND AND PREVIEW ON THAT, IN THE EVENT IT
18 COMES UP.

19 **THE COURT:** OKAY. WELL, THANK YOU. AND I APPRECIATE
20 THE HEADS-UP ON WHAT'S OUT THERE. I DON'T KNOW IF ANYONE HERE
21 WANTS TO MAKE ANY COMMENT IN THAT REGARD, TO ADD TO THE
22 INFORMATION.

23 SIR?

24 **MR. EHSAN:** THANK YOU, YOUR HONOR. HOUMAN EHSAN ON
25 BEHALF OF AMYLIN.

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1 YOUR HONOR, MR. THOMPSON RECOUNTED THE HISTORY
2 RELATIVELY CONSISTENT WITH OUR POSITION, BUT I DO WANT TO JUST
3 FLAG ONE MORE ISSUE FOR THE COURT. THE SUBPOENAS SERVED ON THE
4 UNIVERSITY OF TEXAS ARE ELEVEN SUBPOENAS SET FOR DEPOSITIONS
5 BEGINNING IN EARLY APRIL AND RUNNING TOWARD MID APRIL. WE
6 THINK THAT IS -- WELL, REGARDLESS OF THE POSITION THAT THE
7 TEXAS A.G.'S OFFICE IS GOING TO TAKE ON THE BURDEN IMPOSED BY
8 THESE SUBPOENAS ON VARIOUS FOLKS, INCLUDING CERTIFIED PUBLIC
9 ACCOUNTANTS AT THE UNIVERSITY OF TEXAS, WE DO THINK THAT THE
10 POTENTIAL ABILITY FOR PLAINTIFFS TO SUPPLEMENT THEIR EXPERT
11 REPORTS BY VIRTUE OF CLAIMING THAT ELEVEN SUBPOENAS ARE
12 OUTSTANDING MAY BE SKEWING THE FACTUAL RECORD A BIT. AND
13 DEFENDANTS WOULD LIKE TO RESERVE THEIR RIGHTS TO BRING UP
14 BEFORE THE COURT WHETHER OR NOT THESE SUBPOENAS WERE ACTUALLY
15 TIMELY GIVEN; THAT THE DISCOVERY CUTOFF FOR FACT DISCOVERY IN
16 THIS CASE HAS LONG SINCE BEEN CLOSED.

17 **THE COURT:** CERTAINLY. I WOULD RESERVE ANY
18 OBJECTIONS YOU HAVE OR ANY UNEXPRESSED POSITIONS BY THE
19 PLAINTIFFS ON THE ISSUE. WE UNDERSTAND THERE IS AN ISSUE
20 PERHAPS BREWING AND THAT IS AS FAR AS IT WILL GO FOR NOW. BUT
21 I APPRECIATE YOUR COMMENTS ON THAT.

22 AND I TAKE IT THAT THE TEXAS A.G. WILL PROBABLY SEEK
23 RELIEF IN THE APPROPRIATE DISTRICT IN TEXAS, I'M GUESSING, IF
24 THEY ARE GOING TO TRY TO STOP THE PROCESS, BUT MAYBE NOT.

25 **MR. EHSAN:** WELL, IN THEORY, BASED ON MY

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1 UNDERSTANDING, THEY COULD SEEK THAT RELIEF EITHER IN TEXAS OR
2 HERE, DEPENDING ON THE CIRCUMSTANCES.

3 **THE COURT:** I FIGURE THEY WANT THE HOME COURT
4 ADVANTAGE SO THEY WILL PROBABLY DO IT THERE. BUT THAT DISTRICT
5 DOES HAVE THE RIGHT, UNDER RULE 45, TO DEFER AND SEND THEM OUT
6 TO ME. SO WE'LL SEE.

7 **MR. EHSAN:** THANK YOU, YOUR HONOR.

8 **THE COURT:** THANK YOU FOR TELLING ME YOUR CONCERNS.
9 YES, SIR, MR. THOMPSON.

10 **MR. THOMPSON:** AND I'M NOT GOING TO ADDRESS ANYTHING
11 FACTUALLY. AND I UNDERSTAND THAT THEY ARE RESERVING THEIR
12 RIGHTS. BUT JUST AS TO THE BURDEN ON THE UNIVERSITY OF TEXAS,
13 I WANTED TO SAY THAT I DID SEND AN E-MAIL TO THEIR CHIEF LEGAL
14 OFFICER, SINCE WE HAD SERVED ELEVEN OF THE SUBPOENAS.

15 AND THE REASON WE DID THAT IS BECAUSE WE HAVE BEEN
16 RUNNING AROUND THE WORLD, LITERALLY, TRYING TO FIND THESE
17 SLIDES SO WE COULD SCAN THEM. AND I LET HIM KNOW THAT WE
18 SERVED ELEVEN SUBPOENAS SO THAT WE COULD GET THAT INFORMATION,
19 BUT THAT MY INTENTION WAS THAT WE WOULD NARROW THAT DOWN
20 DRAMATICALLY WHEN HE HAD THE OPPORTUNITY TO TALK TO THOSE
21 ELEVEN FOLKS AND FIGURE OUT IF IT'S REALLY JUST ONE OR TWO THAT
22 WE NEED TO TALK TO.

23 I DO NOT WANT TO PUT A BURDEN ON THE UNIVERSITY OF
24 TEXAS, AND I'VE REACHED OUT TO THEM TO LET THEM KNOW THAT.

25 **THE COURT:** WELL, THANK YOU FOR THAT FURTHER

1 SUPPLEMENTATION.

2 AND THEN WHY DON'T WE TURN -- UNLESS THERE IS
3 SOMETHING ELSE -- TO THE THYROID CASES.

4 AND I THINK, MR. KING, YOU WERE GOING TO TAKE THE
5 FIRST STEP ON THAT?

6 **MR. KING:** YES, YOUR HONOR. KENNETH KING FOR ELI
7 LILLY AND COMPANY. AS WE DID LAST TIME, I WANTED TO BEGIN BY
8 GIVING YOUR HONOR A BRIEF STATUS REPORT OF THE INVENTORY.

9 LILLY AND AMYLIN CURRENTLY HAVE A TOTAL OF 71 THYROID
10 CANCER CASES. 63 HAVE BEEN SERVED, EIGHT HAVE NOT BEEN SERVED.
11 AND I KNOW YOUR HONOR WAS FOCUSED ON THE CASES THAT HAD NOT
12 BEEN SERVED, LAST TIME.

13 THAT ISSUE HAS PRETTY MUCH BEEN RESOLVED. AS WE SAID
14 WE WOULD DO, WE PROVIDED A LIST OF UNSERVED CASES TO
15 MR. THOMPSON. OF THE EIGHT CURRENTLY NOT SERVED, ALL BUT TWO
16 HAVE BEEN FILED ONLY RECENTLY. OF THE TWO CASES THAT HAVE NOT
17 BEEN SERVED AND HAVE NOT BEEN FILED RECENTLY, WE WILL PROVIDE
18 THOSE -- IDENTIFY THOSE TO THE PLAINTIFFS AND SEE IF WE CAN
19 RESOLVE THAT ISSUE.

20 **THE COURT:** OKAY.

21 **MR. KING:** YOUR HONOR SIGNED THE IMPLEMENTING ORDER
22 FOR THE PLAINTIFFS' FACT SHEET ON MARCH 2ND. AND, THEREFORE,
23 WITHIN 75 DAYS WE ANTICIPATE RECEIVING FIELD DATA COMPLETED
24 PLAINTIFFS' FACT SHEETS. HOPEFULLY, IF THEY ARE READY EARLY,
25 WE CAN RECEIVE THEM ON A ROLLING BASIS. FOR CASES FILED AFTER

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1 MARCH 2ND, WE'D RECEIVE THEM 45 DAYS PURSUANT TO YOUR HONOR'S
2 ORDER.

3 THERE IS AN ISSUE THAT HAS ARISEN AS A RESULT OF AN
4 ORDER YOUR HONOR ISSUED IN THE SAVINAR CASE, AND I WANTED TO
5 CLEAR THAT ISSUE UP TODAY, IF I COULD.

6 THE SAVINAR CASE -- IT'S S-A-V-I-N-A-R -- DOCKET
7 NUMBER 14CV1512, THAT IS A THYROID CANCER CASE. AND YOUR HONOR
8 ISSUED AN ORDER. IT'S ORDER NUMBER -- OR DOCUMENT SIX ON THE
9 COURT'S DOCKET. IT'S DATED FEBRUARY 27TH, 2015. AND IT'S AN
10 ORDER ORDERING LILLY AND AMYLIN TO ANSWER THE COMPLAINT.

11 AND WHAT I WANT TO CLARIFY IS THIS, YOUR HONOR. LAST
12 JULY YOUR HONOR STAYED THE ANSWERS TO THE THYROID CANCER CASES
13 PENDING CREATION OF MASTER PLEADINGS.

14 ON AUGUST 14TH, YOUR HONOR, AT THE CONFERENCE, STATED
15 THAT THE THYROID CASES WOULD TRAIL BEHIND THE PANCREATIC CANCER
16 CASES, IN EFFECT STAYING THE CASES.

17 AT THE LAST CONFERENCE, FEBRUARY 2, YOUR HONOR
18 ESSENTIALLY LIFTED THAT STAY WITH RESPECT TO THE PLAINTIFFS'
19 FACT SHEETS. BOTH PLAINTIFFS AND DEFENDANTS WERE UNDER THE
20 IMPRESSION THAT THE STAY ON ANSWERS WAS STILL IN EXISTENCE, AND
21 THAT IS WHY THE SAVINAR CASE WAS NOT ANSWERED.

22 **THE COURT:** WELL, IS IT THE PREFERENCE OF THE DEFENSE
23 TO HAVE THAT MATTER STAYED AS THINGS CONTINUE TO DEVELOP AT
24 THIS POINT?

25 **MR. KING:** WELL, I THINK AS LONG AS PLAINTIFFS' FACT

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1 SHEET DISCOVERY IS ONGOING WE WOULD BE CONTENT TO HAVE THE
2 ANSWER PROCESS STAYED, AS WELL, AND I CAN SPEAK FOR LILLY AND
3 AMYLIN.

4 **THE COURT:** HOW ABOUT FROM THE PLAINTIFFS'
5 STANDPOINT? I DON'T KNOW THAT I MADE THAT CONNECTION AT THE
6 TIME WHEN WE LIFTED THE STAY. I DIDN'T THINK THROUGH IT, SO MY
7 APOLOGIES. BUT WOULD IT BE IN THE PLAINTIFFS' INTEREST TO STAY
8 THE ANSWERS AS THESE EARLY PROCEEDINGS CONTINUE?

9 **MR. SHKOLNIK:** WE WOULD AGREE WITH THAT, YOUR HONOR.

10 **MR. THOMPSON:** YOUR HONOR, RYAN THOMPSON. WE HAVE
11 NO OBJECTION TO THAT AT ALL. WE THINK IT MAKES SENSE TO
12 PROCEED ALONG THAT PATH. AND IF THE COURT IS AMENABLE TO THAT,
13 WE ARE, AS WELL.

14 AND THEN TO BACKTRACK JUST A SECOND TO MR. KING'S
15 DISCUSSION RELATED TO THE UNSERVED THYROID CASES. I WOULD,
16 AGAIN, OFFER MY SERVICES TO HELP FACILITATE SERVICE AND WORK
17 WITH PLAINTIFFS' COUNSEL TO GET THOSE SERVED. I THINK WE WERE
18 PRETTY SUCCESSFUL IN GETTING THE MAJORITY DONE THE FIRST TIME,
19 WORKING TOGETHER, AND I WOULD BE HAPPY TO DO THAT AGAIN.

20 **THE COURT:** OKAY. SO GIVEN THIS CONVERSATION, I WILL
21 ISSUE AN ORDER STRIKING DOCUMENT SIX, RELIEVING THE OBLIGATION
22 TO ANSWER IN SAVINAR, AND MEMORIALIZING THE CONTINUED STAY,
23 GENERALLY, IN THE THYROID CASES, SUBJECT TO FURTHER ORDER. AND
24 THAT SHOULD SOLVE THAT. AND MY APOLOGIES FOR CAUSING THE
25 PROBLEM.

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1 ANYTHING ELSE TO REPORT AT THIS POINT, MR. KING, ON
2 THE DEFENSE SIDE?

3 **MR. KING:** I DO HAVE A REQUEST, YOUR HONOR.

4 **THE COURT:** YEAH.

5 **MR. KING:** AN ADMINISTRATIVE ONE. THE ORDERS,
6 GENERALLY, IN THE THYROID CANCER CASES, HAVE BEEN UNDER THE
7 CHILDRESS CAPTION, AS YOUR HONOR KNOWS. AND WE WOULD ASK THAT
8 SUCH ORDERS BE PROPAGATED TO THE INDIVIDUAL THYROID CANCER
9 CASES, AS WELL, TO RELIEVE ANY CONFUSION THAT MAY BE CAUSED.

10 FOR EXAMPLE, A PLAINTIFFS' LAWYER WHO HAS A CASE, AN
11 ISOLATED THYROID CANCER CASE, MAY NOT RECEIVE A GENERAL -- AN
12 ORDER APPLYING TO THE CASES GENERALLY IF IT APPEARS ONLY UNDER
13 THE CHILDRESS CAPTION.

14 **THE COURT:** OKAY. I DON'T THINK THERE IS ANY REASON
15 WE SHOULDN'T DO THAT; RIGHT? WE CAN ADMINISTRATIVELY FIX THAT.

16 **MR. KING:** THANK YOU, YOUR HONOR.

17 **THE COURT:** SO THEY WILL ALL BE COPIED FOR ALL OF THE
18 COORDINATED CONSOLIDATED CASES.

19 AND IF THAT IS IT FOR YOU, MR. KING, ANYBODY ON THE
20 PLAINTIFFS' SIDE HAVE ANYTHING ELSE TO ADD ON THESE CASES?

21 **MR. SHKOLNIK:** YOUR HONOR --

22 **MR. THOMPSON:** NOTHING FROM PLAINTIFFS, YOUR HONOR.

23 **THE COURT:** MR. THOMPSON SAYS NO AND MR. SHKOLNIK
24 CONCURS.

25 WOULD IT BE USEFUL TO SET AN APRIL 2ND STATUS FOR THE

1 THYROID IN CONJUNCTION WITH WHAT WE'RE DOING WITH THE MDL, JUST
2 TO TALK ABOUT ANYTHING THAT MAY BE AFOOT?

3 **MR. KING:** YES, YOUR HONOR. SURE.

4 **MR. SHKOLNIK:** YES, YOUR HONOR.

5 **THE COURT:** OKAY. ALL RIGHT. SO BOTH CASES WILL BE
6 ON FOR STATUS APRIL 2ND AT 2:00. THE MOTIONS ARE SUBMITTED AS
7 INDICATED, WITH AN ORDER TO FOLLOW AS SOON AS REASONABLY
8 POSSIBLE.

9 AND WE'LL FIX THE SAVINAR ORDER AS WE'VE TALKED
10 ABOUT.

11 IS THERE ANYTHING ELSE, THEN, FOLKS?

12 **MR. SHKOLNIK:** NOTHING FROM THE PLAINTIFFS.

13 **THE COURT:** ALL RIGHT. THANK YOU ALL VERY MUCH FOR
14 THE EXTENDED DISCUSSION ON THE MOTIONS, THE CASE IN GENERAL.
15 AND YOUR CONTINUED PROFESSIONALISM AND COOPERATION IS MUCH
16 APPRECIATED.

17 SO THE MATTER IS SUBMITTED. WE'LL TALK TO YOU IN
18 APRIL AND YOU WILL HEAR FROM ME IN THE MEANTIME. YOU-ALL TAKE
19 CARE. WE ARE IN RECESS.

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25
MARCH 12, 2015

1 (PROCEEDINGS CONCLUDED AT 3:42 P.M.)

2 CERTIFICATION

3 I HEREBY CERTIFY THAT I AM A DULY APPOINTED,
4 QUALIFIED AND ACTING OFFICIAL COURT REPORTER FOR THE UNITED
5 STATES DISTRICT COURT; THAT THE FOREGOING IS A TRUE AND CORRECT
6 TRANSCRIPT OF THE PROCEEDINGS HAD IN THE AFOREMENTIONED CAUSE
7 ON MARCH 12, 2015; THAT SAID TRANSCRIPT IS A TRUE AND CORRECT
8 TRANSCRIPTION OF MY STENOGRAPHIC NOTES; AND THAT THE FORMAT
9 USED HEREIN COMPLIES WITH THE RULES AND REQUIREMENTS OF THE
10 UNITED STATES JUDICIAL CONFERENCE.

11 DATED: MARCH 18, 2015, AT SAN DIEGO, CALIFORNIA.

12 S/N _____
13 JEANNETTE N. HILL, OFFICIAL REPORTER, CSR NO. 11148
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MARCH 12, 2015